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In the Supreme Court of the United States

No. 2

OCTOBER TERM, 1955.

HOLOPHANE COMPANY, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

BRIEF OPPOSING MOTION TO AFFIRM PORTIONS OF THE JUDGMENT.

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Appellee.

BRIEF OPPOSING MOTION TO AFFIRM PORTIONS OF THE JUDGMENT.

Introduction.

Appellee has conceded that probable jurisdiction should be noted on this appeal (Motion to Affirm, p. 6). Appellee then seeks to circumscribe the scope of possible relief by the instant motion to affirm paragraphs I through X inclusive, XII and XIII of the judgment of the District Court. Pursuant to Rule 16, paragraph 3 of the Revised Rules of this Court, Holophane Company, Inc., appellant, submits its brief opposing such motion. Appellant's grounds for opposing said motion are as follows:

1. The motion was filed out of rule.
2. The authority cited in support of the motion does not sustain the position asserted.
3. The nature of the question conceded by appellee to be proper for presentation to the Court requires that the entire decree remain open for further consideration.

ARGUMENT.

1. The Motion Was Filed Out of Rule.

Appellee bases its right to file its motion on Rule 16, paragraph 1(c) of the revision effective July 1, 1954 (Motion to Affirm, p. 1). Paragraph 1 of Rule 16 has as its first sentence,

> "Within thirty days after receipt of the jurisdictional statement, the appellee may file a printed motion to dismiss, or motion to affirm."

The Solicitor General was served with copies of appellant's Jurisdictional Statement on June 8, 1955. On the same day the Jurisdictional Statement was filed with the Clerk of this Court. The thirty day period provided for the filing of a motion under Rule 16 therefore expired July 8. Counsel for appellant were not served with copies of the instant motion until July 12. The Motion to Affirm Portions of the Judgment was therefore served and filed out of rule.

2. The Authority Cited in Support of the Motion Does Not Sustain the Position Asserted.

The procedural authority cited by appellee for its motion is *United States v. U. S. Gypsum Co.*, 340 U. S. 76 (1950). Appellee states that the Court there "under similar circumstances affirmed part of the judgment" (Motion to Affirm, p. 9). The similarity is hardly close. The reason for affirming a part of the decree for plaintiff in the *Gypsum* case was the prior holding by this Court in *United States v. U. S. Gypsum Co.*, 333 U. S. 364 (1948), that plaintiff's case was sufficient as a matter of law, i.e., that the government's evidence made out a *prima facie* case of violation of the Sherman Act. On the basis of that determination, the appeal by the defendants after

remand was dismissed and Article III of the decree of the lower court affirmed. 339 U. S. 959, 960 (1950). With reference to the dismissal of defendants' appeal, the Court said at page 82 of 340 U. S.:

> "The reasons for our action lay in the fact that our holding in our first opinion, 333 U. S. 364, justified a summary judgment for plaintiff on the issue of the violation of the Sherman Act when the record was considered in the light of our opinion and defendants' offer of proof on the remand."

Later on the same page the Court states:

> "For the same reasons that we dismissed defendants' appeal, this Court affirmed Article III of the District Court decree."

Thus the only authority cited by appellee directly in support of the action requested by the instant motion involved a case where this Court had previously had an opportunity to review the record and, as a result of such opportunity, had determined that a *prima facie* case of violation existed. In the present case this Court has had no prior opportunity to review the record. Therefore the *Gypsum* case is not authority for the action urged upon the Court by appellee.

3. The Nature of the Question Conceded by Appellee to Be Proper for Presentation to the Court Requires That the Entire Decree Remain Open for Further Consideration.

Although appellant stressed only one broad issue as a basis for noting probable jurisdiction herein, both its Notice of Appeal and its Jurisdictional Statement contained other grounds. Likewise the Jurisdictional Statement made it plain that appellant did not waive or abandon "the first four enumerated questions involved in this

appeal" (Jurisdictional Statement, p. 12). In effect the motion of the appellee undertakes to compel a waiver or abandonment of those questions. If such is done, the waiver or abandonment should be voluntary by the appellant which has employed the required procedure to advise appellee in timely manner of the questions appellant believes to be involved. Appellant should not be penalized for its frankness in narrowing the points argued in its Jurisdictional Statement.

Far more important, the motion would go farther and strait-jacket the relief which this Court might give if probable jurisdiction is noted and appellant's position sustained upon full hearing. Appellee openly acknowledges the propriety of noting probable jurisdiction on the substantial issue submitted by appellant but seeks to narrow the scope of relief which this Court can give. In his book, *Cases on Federal Anti-Trust Laws* (1948), Professor Oppenheim at page 785 lists certain questions as being among the issues not yet presented for adjudication in the courts. These questions are akin to the broad issue submitted as a basis for noting probable jurisdiction and include the following:

> "(1) What power does a court, either of law or equity, have to order or enjoin the doing of acts in foreign countries? * * *
>
> "(2) To what extent will a foreign court enforce an American judgment? * * *
>
> "(3) What is the effect of a declaration of a federal court that a cartel agreement is unlawful? * * *"

The mere recitation of the foregoing questions indicates the need for freedom to determine what type of decree should be entered herein if ultimate relief is given appellant. As an illustration, in Paragraph X of the decree of the District Court, the appellant is ordered:

"A. To cancel and terminate in all contracts and agreements with and invoices to customers and distributors such provisions as restrict or prevent said customers or distributors from reselling said products in any foreign country;

"B. To notify all its customers and distributors that the defendant does not restrict or restrain the exportation or resale of said products manufactured or sold by the defendant in or to any foreign country;

"C. To send a letter of notification to 'Limited' and 'Francaise' enclosing a copy of this Judgment and informing the aforesaid companies that they are no longer obligated not to export goods to any country included in the territory of the defendant, including the United States.

"D. To file a report with the Clerk of this Court within three months from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph X." (Jurisdictional Statement, pp. 35-36.)

If relief is granted under numbers 5, 6 and 7 of the Questions Presented (Jurisdictional Statement, pp. 4-5), it may well be that some revision of Paragraph X, for example, should be made. Certainly at this stage of the proceeding when the Court has not yet had an opportunity to review the record in this case, the entire decree should be kept open. Only in such posture will the Court maintain proper flexibility and be free either to settle the language of the decree itself or to remand the case for further consideration in the District Court without having restricted itself in advance in a way which might vitiate the relief to be granted.

CONCLUSION.

Appellant respectfully submits that because appellee's motion was filed out of rule, because the *Gypsum* case is inapplicable to said motion and because this Court should not be asked to restrict the scope of relief which it may hereafter grant, appellee's motion should be overruled.

Respectfully submitted,

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BRIEF FOR THE APPELLANT.

OPINION BELOW.

No opinion as such was written by the District Court. The findings of fact and conclusions of law are reported at 119 F. Supp. 114 (R. 700-08). The judgment and decree is reported in CCH Trade Reg. Rep. (1954 Trade Cas.) ¶ 67679 at 69180 (R. 693-700).

JURISDICTION.

(i) The case is a civil action brought by the United States under Section 4 of the Sherman Act to prevent and restrain alleged violations of Section 1 thereof (R. 4).

(ii) The judgment and decree sought to be reviewed was entered February 8, 1954 (R. 693). Thereafter on February 19, 1954, appellant filed its motion for new trial,

to admit additional testimony, for amendment of and additional findings of fact and conclusions of law and for altering or amending the judgment (R. 708). On April 5, 1954, defendant filed a supplemental motion for altering or amending the judgment together with a supporting affidavit (R. 712).

On February 9, 1955, the District Court mailed to counsel a paper styled "Memorandum," signed by Judge Underwood, marked "Copy" and stamped "Filed Feb. 9, 1955. Wm. Robinett, Jr., Clerk" (R. 717). The memorandum found that, except for the correction of a date, appellant's motions for new trial and other relief were "not well taken and should be overruled." A notice of appeal was filed in the District Court on April 9, 1955 (R. 718). Thereafter it developed that no order had been entered upon the memorandum of February 9, 1955. On June 2, 1955, an order conforming to such memorandum was filed *nunc pro tunc* February 9, 1955 (R. 718). On June 4, 1955, a second notice of appeal was filed in the District Court identical with the first notice of appeal except for recitation of the filing of the order of June 2, 1955, to take effect as of February 9, 1955 (R. 3).

(iii) The jurisdiction of the Supreme Court to hear this appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

(iv) The statement of jurisdiction having been submitted and considered, probable jurisdiction was noted October 10, 1955. 350 U. S. 814.

STATUTE INVOLVED.

Sections 1 and 4 of the Sherman Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 4, so far as here pertinent, read:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"
>
> "4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; * * *"

QUESTIONS PRESENTED.

1. Whether contracts imposing territorial and other restrictions upon the corporate parties thereto (made in connection with the sale of one of the contracting corporations) are violative per se of Section 1 of the Sherman Act without respect to (a) the fact that foreign trade is involved, (b) the prior common ownership of the contracting corporations and (c) the size and market position of appellant.

2. Whether a United States District Court which has jurisdiction solely over the American member of an illegal cartel arrangement, upon determining to enjoin future adherence to the underlying contracts with foreign corporations, has power to order the American defendant to perform affirmative acts abroad in carrying on business in violation of the terms thereof.

3. Whether, if power to order affirmative acts abroad exists in a United States District Court under the circumstances described in the question immediately preceding, such power should be exercised regardless of (a) the size of the defendant or its financial or business capacity to comply with such an order and (b) the fact that such affirma-

tive acts will constitute a breach of defendant's contractual obligations in foreign countries where such contracts are valid and enforceable.

STATEMENT OF THE CASE.

The appellant, Holophane Company, Inc., a Delaware corporation, was the sole defendant below. The complaint named as co-conspirators Holophane, Limited, hereafter sometimes called Limited, a British joint stock company, and La Societe Anonyme Francaise Holophane, hereafter sometimes called Francaise, a French corporation (R. 4-5).

The complaint charged that appellant combined and conspired with the co-conspirators to violate Section 1 of the Sherman Act by allocating territories, by restricting importation and exportation and by agreements relating to trade-marks, inventions, developments and similar matters (R. 6-8). Appellant's answer set forth three defenses: (1) failure to state a claim upon which relief could be granted; (2) denial of the combination and conspiracy charged and (3) reasonableness of the restraints imposed as incident to the sale of a business and the goodwill thereof (R. 10-11).

Appellant manufactures prismatic glassware (R. 701). It also assembles lighting fixtures embodying prismatic glass (R. 57-58). Both Limited and Francaise have some additional categories of products to those made by appellant. Both either manufacture or sell similar products except that neither has as full a line as appellant (R. 61-62, 701).

Appellant maintains offices in New York City and its only manufacturing plant in Newark, Ohio (Govt. Ex. 30; R. 53, 222; R. 67, 700-01). Appellant's aggregate of capital stock and surplus as of June 30, 1948, was $1,493,056.77 (Deft. Ex. 17; R. 93, 613; R. 75). Appellant's total gross

sales of prismatic glassware and fixtures in the year 1948 were $3,517,364.75* of which glassware sales amounted to $2,091,962.61 and fixture sales amounted to $1,425,402.14 (R. 701).

Although appellant manufactures prismatic glassware and assembles lighting fixtures containing such glassware, these physical products are sold by it primarily as an adjunct to the services rendered by its engineering organization. Appellant employes twenty-five salesmen-engineers who utilize the available Holophane products in the discharge of their functions. Seventy-five per cent of its sales results from its engineering service. The rendition of scientific lighting service is the real business of the appellant, all of its salesmen being trained engineers (R. 57-58, 71-72).

The early history of the Holophane enterprise is indicated in the following quotation from a stipulation of facts by counsel at trial:

> "We, the attorneys for the respective parties, do hereby stipulate that about 1892 Professor Andre Blondel developed a new type of prismatic glass globe in Paris, France. An American, Mr. Otis A. Mygatt, after meeting Professor Blondel, and becoming interested in this prismatic glass globe, formed the Holophane Glass Company of New Jersey in 1898 to develop scientific lighting service and to manufacture and sell this new development and related developments in prismatic lighting glassware.
>
> "About 1912 Mr. Mygatt organized an English Company called Holophane Limited, and he turned over to that company all of the stock of the Holophane Glass Company. Mr. Mygatt later formed La Societe Anonyme Francaise Holophane of France. At that

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* By error of addition, given as $3,517,365.75 in finding of fact No. 7 (R. 701).

time he was a resident of France. At the time of the sale of the Holophane Glass Company to the American interests described below, Mr. Mygatt owned the controlling stock of Holophane Limited and of La Societe Anonyme Francaise Holophane.

"In 1925 Messrs. Charles Franck and Joel B. Liberman, Americans, who were interested in the Holophane Glass Company, as manager and attorney respectively, got together a group from the management and their friends to buy the Holophane Glass Company from Holophane Limited. This purchase was accomplished in 1925." (R. 97-98.)

At the time of the 1925 purchase of the wholly-owned American subsidiary, Holophane Glass Company, Inc., from Limited by appellant's predecessor,* Otis A. Mygatt was the controlling shareholder not only of both Limited and Francaise but also, through Limited, of the American subsidiary (R. 702). Charles Franck was resident American manager and had been for approximately nine years (R. 702). The general manager of Limited, for a similar period, had been one H. Hepworth Thompson (R. 702). Although the purchase was negotiated by Mr. Liberman, who took an option in his own name, subsequent agreements were executed between appellant and Limited (R. 703, 705-06). Mr. Franck is now president of appellant (R. 702).

In 1921 Limited granted an exclusive patent license to Francaise to make and sell prismatic glassware under existing and future patents in Belgium, Spain, Portugal, Switzerland and Italy (R. 701-702). The agreement was

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* Holophane Illuminating Company, Inc., a New York corporation whose name was immediately changed to Holophane Glass Company, Inc., and which merged into appellant in 1929 (R. 703). Hereafter "appellant" will refer to both the present corporation and its predecessor.

in effect at the time Limited sold its American subsidiary in 1925 and has been extended or renewed in substantially the same terms to date (R. 702). These contracts include provisions against export of Holophane glassware from the territory of Francaise to that of Limited and vice versa (R. 702). Other terms require the marking of goods with the name "Holophane" and the exchange of discoveries and improvements (R. 702).

The first meeting of the incorporators of appellant was held September 11, 1925 (Govt. Ex. 1; R. 53, 110). Immediately after approval of Mr. Liberman's proposal to assign his contract with Limited for the purchase of all outstanding shares of Holophane Glass Company, Inc., to the new corporation, an offer by Otis A. Mygatt to purchase all of the authorized 4,000 shares of preferred stock of the new corporation for cash was accepted (Govt. Ex. 1; R. 53, 112). Mr. Mygatt became a director and president of appellant on October 15, 1925 (Govt. Ex. 105 [A-10]*; R. 97, 29-30; Govt. Ex. 8A; R. 53, 170-72). On September 15, 1925, appellant entered into a trading agreement with Limited (Govt. Ex. 4; R. 53, 120; R. 703). The agreement was for an indefinite term (R. 703). The chief points of said agreement were:

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* The designation "A-10" and other "A" exhibits refers to exhibits attached to a request for admissions of genuineness and truth filed by the Government under Fed. R. Civ. P. 36(a). The request for admissions was offered in evidence as Govt. Ex. 105 (R. 97, 11). Appellant's denial of certain items in said request was offered in evidence as Govt. Ex. 106 (R. 97, 38). Appellant takes the position that the offer of the request for admissions (Govt. Ex. 105) carries with it the documents whose genuineness was admitted by the appellant even though all of such documents were not severally offered, marked with a new number and separately admitted. In addition appellant urged the District Court to admit specifically certain "A" exhibits under Fed. R. Civ. P. 59(a) at the time of its motion for new trial (R. 709). This was denied (R. 717). References hereafter to "A" exhibits are made subject to this footnote.

(a) The territory of the appellant is defined as that part of the Continent of America north of the Panama Canal and adjacent islands (not including the West Indies), the Philippine Islands, the Republic of Cuba and the Empire of Japan. The territory of Limited is defined as the whole of the world except the territory of the appellant and the Republic of France and its Colonies.

(b) Each party agrees to use every means in its power to prevent the exportation from its territory into the territory of the other, of products sold or manufactured by it, except with the consent in writing of that party.

(c) Each party agrees that it will not carry on trade in the territory of the other, except at the request and for the benefit of that party.

(d) Each party agrees that it will neither apply for nor obtain patent or trade-mark protection in the territory of the other, except at the request and for the benefit of that party.

(e) Each party agrees to communicate and assign every invention, design, discovery or improvement and trade-mark to the other, and render any aid necessary to enable the other to secure proper protection in its territory.

(f) Each party agrees to supply to the other, when requested, Holophane products at a price equal to factory cost, plus 30 per cent, delivered at place of manufacture.

(g) The agreement defines "Holophane products" as any product sold under the trade-mark or trade name "Holophane" and/or manufactured or sold by either company (R. 703-704).

On June 29, 1926, a patent and manufacturing agreement similar to that just outlined was entered into between appellant and Francaise (Govt. Ex. 6; R. 53, 135;

R. 704). The agreement was executed as of September 15, 1925 (R. 704). Mr. Liberman, who negotiated the purchase of the American property, had said that he could offer a similar arrangement with Francaise in the same letter in which he described the trading agreement between appellant and Limited (Govt. Ex. 2; R. 53, 114; R. 704). Such an agreement with Francaise was authorized October 15, 1925 (Govt. Ex. 105 [A-10]; R. 97, 30-31).

After considerable correspondence appellant in 1944 acquired the right to sell in the South American territory, theretofore held by Limited, for the sum of $40,300 (R. 705). With relatively small modifications the so-called trading agreement between appellant and Limited and the patent and manufacturing agreement between appellant and Francaise remained in operation at the time of the trial (R. 706).

Appellant's gross sales and aggregate capital stock and surplus for the years 1940 through 1951 and 1949, respectively, were as follows:

	Gross Sales			
Year	Glassware	Fixtures	Total	Capital Stock and Surplus
1940	$ 740,202.13	$ 370,803.34	$1,111,005.47	$ 791,926.65
1941	1,049,590.72	561,702.44	1,611,293.16	706,229.17
1942	1,456,801.14	935,451.40	2,392,252.54	853,746.19
1943	1,538,065.08	1,201,063.34	2,739,128.42	926,887.64
1944	869,464.96	578,206.93	1,447,671.89	810,144.02
1945	971,651.33	423,658.13	1,395,309.46	814,768.04
1946	1,169,966.39	711,804.87	1,881,771.26	962,360.17
1947	1,665,377.35	1,234,023.44	2,899,400.79	1,261,100.34
1948	2,091,962.61	1,425,402.14	3,517,364.75	1,493,056.77
1949	2,154,566.22	1,387,784.33	3,542,350.55	1,859,313.41
1950	2,136,179.77	1,267,025.60	3,403,205.37	
1951	2,973,520.98	1,704,861.32	4,678,382.30	

(Govt. Ex. 96-104; R. 94, 398-469; Deft. Ex. 17; R. 93, 613; R. 93-94, 96-97.)

The complaint alleged that appellant produces "[m]ore than 95%, by value, of all the prismatic glass-

ware used in street lighting luminaires * * *." (R. 5.) This was denied by answer (R. 10). The charge was never proved. Appellant's product for the street lighting field is a line of prismatic glass refractors which direct light into predetermined patterns (Govt. Ex. 31; R. 53, 271-314; R. 67-68). Its street lighting business constitutes about 15 per cent of its total business (R. 75, 103-04). The proof showed that "* * * somewhere around 3 per cent" of the street lighting equipment in the United States used Holophane glassware in 1948 (R. 102). The percentage for the whole world would be much less (R. 103). Any closed street lighting globe in today's market is a form of prismatic glass (R. 104). Whatever freedom from competition appellant may enjoy in prismatic refractors, as distinguished from the generality of prismatic glass globes, arises because "* * * the prismatic refractor market is so small in dollar volume and in any element of glass manufacture, that for years and years and years no other glass company has ever gone into it. There wasn't enough business to justify it." (R. 107.) Fifty-five different companies are engaged in the sale of some part of street lighting equipment (R. 101).

In addition to its use in street lighting and illuminating appliances for factories, offices, schools, stores, hospitals, art galleries and broadcasting studios, prismatic glassware is used in transportation, marine, aviation and traffic lighting fixtures (R. 701). Every automobile has at least six pieces (R. 92). Prismatic glassware is also used in the architectural field for skylights, windows and the like (R. 68-69, 87-88). In the field of prismatic glassware for lighting generally the following American companies make one or more products:

Corning Glass Works, Lighting Division (Deft. Ex. 1; R. 82, 471; R. 80, 83);

The Kirlin Company (Deft. Ex. 2; R. 82, 522; R. 80, 83-85);

The Phoenix Glass Company (Deft. Ex. 3; R. 82, 526; R. 80-81, 85);

Libbey-Owens-Ford Glass Company (Deft. Ex. 4; R. 82, 530; R. 81, 85-87);

Mississippi Glass Co. (Deft. Ex. 5; R. 82, 554; R. 81, 87-88);

Kopp Glass, Inc. (Deft. Ex. 6; R. 82, 571; R. 81, 88);

The Miller Company (Deft. Ex. 7; R. 82, 573; R. 81, 89);

Crouse-Hinds Company (Deft. Ex. 8; R. 82, 577; R. 81, 89);

The Grote Mfg. Co., Inc. (Deft. Ex. 9; R. 82, 605; R. 81, 89).

In the same field the following British Companies also make one or more prismatic glassware products:

Heyes of Wigan (Deft. Ex. 10; R. 82, 606; Deft. Ex. 14; R. 82, 610; R. 81-82, 89-91);

Revo Electric Co., Ltd. (Deft. Ex. 11; R. 82, 607; R. 81-82, 90-91);

The Edison Swan Electric Co., Ltd. (Deft. Ex. 12; R. 82, 608; R. 82, 90-91);

Falk, Stadelmann & Co., Ltd. (Deft. Ex. 13; R. 82, 609; R. 82, 90-91);

The General Electric Co., Ltd. (Deft. Ex. 15; R. 82, 611; R. 82, 90-91).

The trial before the Honorable Mell G. Underwood was held June 2 and 4, 1952 (R. 51, 66, 86). Argument on the proposed findings of fact and conclusions of law and upon the proposed forms of decree was held May 8, 1953 (R. 663). The judgment and decree of the Court was entered February 8, 1954 (R. 693). The findings of fact and conclusions of law were filed the same day (R. 700). By

stipulation of counsel approved by the Court, the judgment and decree was amended February 9, 1955 (R. 715). On February 9, 1955, the District Court overruled appellant's various motions under Rules 59 and 60 of the Federal Rules of Civil Procedure for a new trial and other relief (R. 708, 712, 717).

The judgment and decree recited that it cancelled the following agreements between appellant and Limited or Francaise together with any agreements amendatory thereof or supplemental thereto:

(a) Agreement dated September 15, 1925, between Limited, The Holophane Glass Company, Inc. (Limited's American subsidiary) and appellant, commonly referred to as the "Trading Agreement" (Govt. Ex. 4; R. 53, 120);

(b) Agreement dated as of September 15, 1925, between appellant and Francaise, commonly referred to as the "Trading Agreement" (Govt. Ex. 6; R. 53, 135);

(c) Agreement dated February 1, 1944, between the appellant and Limited, which modified the "Trading Agreement" referred to in (a) above by making it applicable to the South American territory newly acquired by appellant and which specifically provided for construction under English law and the appointment of an agent for service of process in England by appellant (Govt. Ex. 12; R. 53, 182);

(d) Agreement dated June 11, 1945, between the appellant and Limited entitled "Intercompany Buying Agreement" and specifying percentages above factory cost to be paid in variant situations between companies (Govt. Ex. 19; R. 53, 202; R. 695).

The judgment and decree further enjoined acts which might lead directly or indirectly to a continuation or reestablishment of the restrictive practices found violative

of Section 1 of the Sherman Act (R. 695). In addition the decree included two paragraphs directing affirmative acts and hence mandatory in their nature. These sections in full (R. 697-99), and as amended by stipulation in XI A (R. 715) are as follows:

"X

"Defendant is ordered and directed:

"A. To cancel and terminate in all contracts and agreements with and invoices to customers and distributors such provisions as restrict or prevent said customers or distributors from reselling said products in any foreign country;

"B. To notify all its customers and distributors that the defendant does not restrict or restrain the exportation or resale of said products manufactured or sold by the defendant in or to any foreign country;

"C. To send a letter of notification to 'Limited' and 'Francaise' enclosing a copy of this Judgment and informing the aforesaid companies that they are no longer obligated not to export goods to any country included in the territory of the defendant, including the United States.

"D. To file a report with the Clerk of this Court within three months from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph X.

"XI

"Defendant is ordered and directed:

"A. To use reasonable efforts, including but not limited to the use of present or subsequent distributors or wholly-owned subsidiaries, to promote the sale and distribution of said products in foreign markets, including the territories of 'Limited' and 'Francaise.' Nothing contained in this paragraph shall be construed as requiring the exportation by the de-

fendant of any such products in violation of the valid patent or trade-mark or trade-name rights of any person in any foreign country. If, because of such valid patent or trade-mark or trade-name rights, such exportation can be made into certain countries only by means of unmarked glass or the adoption of another trade-mark or trade-name for such exportation, then the defendant shall, within one year from the date hereof, have available sufficient quantities of unmarked glass or glass marked with a new trade-mark to be distributed under a new trade-name, if necessary, to meet reasonable anticipated foreign demand."

"B. To offer said products for sale and export to the territories of 'Limited' and 'Francaise' at prices and upon terms and conditions of sale not discriminatory as compared to those offered to purchasers for use or resale in the United States.

"C. To take the following specific steps to promote and develop export sales of said products:

"(1) To circularize within one year from the date of this Judgment known potential distributors of said products in the territory of 'Limited' and 'Francaise,' seeking to employ their services in selling and distributing said products.

"(2) Beginning six months from the date of this Judgment and for a period of five years thereafter, to insert advertisements at reasonable intervals in trade journals of appropriate circulation in all countries in which said products manufactured by 'Limited' or 'Francaise' are sold in substantial quantities, of the manufacture and availability for sale of said products.

"(3) To circularize within one year from the date of this Judgment all persons who from January 1, 1948 to date of this Judgment have made written inquiry to the defendant respecting the purchase or distribution of said products, exported to any country in the territory of 'Limited' or 'Fran-

caise' informing them of the manufacture and availability for sale of said products.

"(4) To respond in writing to all persons who from the date of Judgment make written inquiry to the defendant respecting the purchase or distribution of said products for export to the territory of 'Limited' or 'Francaise,' advising them of the manufacture and availability for sale of said products.

"D. To file a report with the Clerk of this Court each year for a period of five years from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph XI."

SUMMARY OF ARGUMENT.

1. The bare fact of territorial and related restrictions between appellant, Limited and Francaise does not per se render the contracts between them violative of the Sherman Act. The central thrust of the Sherman Act is to preserve competition so that there may be the widest practicable freedom of access to products and markets. Whatever may be the rule with reference to domestic commerce, per se illegality cannot arbitrarily attach to contracts imposing territorial and other restrictions in foreign commerce without consideration of prior common ownership of the contracting parties, the law of their respective nations and the size and market position of the domestic defendant.

Instead of arbitrary and unyielding application of a per se rule of illegality, the effect of common prior ownership or control of the contracting parties must be considered. The nature of the market in which the alleged restraint of trade exists must be analyzed together with the size and position of the defendant therein. In short, the existence of a restraint, if any, and the reasonableness of any restraint found must be determined.

American Holophane was a wholly-owned subsidiary of Limited until its sale in 1925 to appellant. Francaise was bound by a 1921 agreement with Limited, made under English law with an appointment of an agent for service, against export into the territory of Limited. Limited agreed to similar restrictions upon its exports into the territory of Francaise (Govt. Ex. 7A; R. 53, 145; R. 701-02). The same man, Otis A. Mygatt, controlled all three Holophane companies up to the time of the 1925 sale (R. 702). Mr. Mygatt bought all of the preferred shares of the purchasing American company and became a director and its president (Gov. Ex. 105 [A-10]; R. 97, 29-30; Govt. Ex. 8A; R. 53, 170-72). The original contract upon which the purchase of the American subsidiary rested was also explicitly made under English law with appointment of an agent for service by appellant's assignor (Govt. Ex. 3; R. 53, 116). Two subsequent contracts executed in 1944 between appellant and Limited contain similar clauses regarding the application of English law and designation of an agent for process (Govt. Ex. 11, 12; R. 53, 180, 183). The same applies to a contract made between Limited and Francaise in 1947 (Govt. Ex. 17; R. 53, 199). The law of England clearly approves territorial and related restrictions such as here presented. The law of France must be presumed to do likewise.

Plainly Limited was a sufficiently dominant factor in the negotiations to insist on such provisions, and no sale would have occurred but for the inclusion of the territorial restrictions and associated provisions for patents, trademarks and trade names. Equally plain is the fact that Mr. Mygatt as an investor in the new American enterprise would not suffer that investment to be dissipated by inter-

company competition between the three then-affiliated companies.

This Court has considered repeated instances of alleged cartels between American companies and foreign competitors. The records have invariably shown market dominance by the American company or companies in the domestic field. In this case the relevant market is prismatic glassware, certainly not Holophane prismatic glassware. Holophane Company, Inc., the appellant, is but a 3 per cent factor in the only aspect of the prismatic glassware market in which any claim to strong market position is even asserted, i.e., the street lighting field (R. 101-02). In contrast with the huge companies whose names stud the decisions of the Court in this area, appellant's average annual sales of glassware from 1940 through 1951 were only $1,568,112.39. The high point was $2,973,520.98 in 1951. In the same period appellant's total average annual sales of prismatic glassware and fixtures containing such glassware were $2,551,594.66 with $4,678,382.30 in 1951 being the high. Its capital and surplus in the last year shown and the highest in the ten years from 1940 through 1949 was $1,859,313.41. Numerous and strong competitors face appellant in the prismatic glassware market, including Corning Glass Works and Libbey-Owens-Ford Glass Company, to mention only two whose size and resources are almost matters of judicial notice.

In the context of the foregoing analysis, if Holophane Company, Inc., was to be born as an independent American company, it was compelled to subscribe to territorial and related restrictions with Limited and Francaise. It faces strong competition and has only a minute portion of the prismatic glassware market. If it is to survive against the "bigness" which exists in the glassware industry generally, including prismatic glassware, appellant should

have the protection of its agreements with Limited and Francaise. Reasonableness in the application of Section 1 of the Sherman Act will not strike down that protection.

2. Jurisdiction solely over the person of appellant as the American member of a cartel arrangement does not give the District Court power to order affirmative business acts abroad in conflict with valid, existing contractual rights of Limited and Francaise. The appellant was the only party served with summons or named as a defendant. Limited and Francaise were merely alleged to be co-conspirators. Nevertheless, compliance with the contracts between appellant and the co-conspirators listed in paragraph V of the judgment and decree is not merely enjoined; the contracts themselves are purportedly cancelled (R. 695). This amounts to unilateral cancellation by a tribunal having no jurisdiction to rule upon the rights of Limited and Francaise. Therefore so far as they are concerned their rights remain unimpaired under valid, existing contracts unless the contrary is shown.

The law of nations is a part of our law. An act of Congress should not be construed to violate that law without the clearest indication of intent. The Sherman Act has no such expression of intent and therefore must be construed in conformity with international law. The judgment and decree ordering affirmative acts abroad thus violates the law of nations because it is an attempt by the United States to impose the economic concepts of the Sherman Act upon markets and territories outside the United States as well as to deprive Limited and Francaise of their contractual rights without a day in court.

No proof supports the position that the provisions of the contracts challenged are unlawful in England and France. Indeed, since the Sherman Act is statutory law, the presumption is to the contrary. This is doubly true in

France where civil law prevails. Furthermore in England it is demonstrable that contracts such as those here involved are wholly legal.

Despite the provisions in certain of the contracts in evidence indicating that English law is to govern and providing for an agent for service of process in England, at this point appellant is not contending that the District Court improperly enjoined compliance with the agreements in question. Appellant *does* insist that the affirmative acts abroad compelled by paragraph XI A of the judgment and decree are beyond the power of the court (R. 698). American law has heretofore recognized this limitation.

The effort to make our antitrust laws applicable abroad involves a misconception of the reach of American jurisdiction. *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] Ch. 19 (C. A. 1952), [1955] Ch. 37 (1954). In the earlier citation an interlocutory injunction was approved by the Court of Appeal restraining the defendant from complying with an order of the District Court for the Southern District of New York. Imperial Chemical Industries, Ltd. (I. C. I.), defendant, had been ordered by the American court to reassign certain British nylon patents to duPont. 100 F. Supp. 504 (1951), 105 F. Supp. 215 (1952). British Nylon Spinners, Ltd. (B. N. S.), had a contract with I. C. I. for an exclusive license under the British patents. In the trial upon the merits I. C. I. was ordered specifically to perform its contract with B. N. S. to grant the license. The British courts were thoroughly aware of the American order and sensitive to the many problems created thereby for British citizens and courts.

The Master of the Rolls, Sir Raymond Evershed, noted at the outset:

> "The American court assumes jurisdiction in personam against a party amenable to its jurisdiction to compel it by contract to modify the rights which the law of another country confers on it in that other country. Moreover, the order is to take effect notwithstanding the plaintiffs' rights. If they have in equity a right to specific peformance against the defendants, does not the order in form purport to interfere with the municipal law of England? We may have to consider to what extent we concede on grounds of the comity of nations extraterritorial jurisdiction to interfere with English patent rights." [1953] Ch. 19, 21.

Plainly sales in the territory of Limited and Francaise violate the contracts. Curiously the judgment and decree in paragraph XI A recognizes specifically that Limited and Francaise may have patent and trade-mark rights which should not be transgressed. To meet the trade-mark problem, provision is made for unbranded or newly-marked glass for sale in British and French territories. Yet such unbranded or newly marked products are Holophane products both in palpable fact and by contract definition, and their sale would violate the express terms of the contracts.

The caution of the Court to provide a means of avoiding conflict with British or French patent and trade-mark law makes plain the fact that the District Court has taken seriously its asserted right to nullify contracts deemed to affront our antitrust laws without consideration of the rights of foreign contracting parties not subject to the jurisdiction of the court. By no stretch of theory should our courts be permitted to arrogate to themselves such a power.

Nor should our courts be permitted to attempt to thrust upon other nations policies which those nations are not interested in or regard as undesirable. A ruling of an

American court which orders the performance in a foreign country of acts contrary to its law and policy is improper and should not be permitted to stand.

3. Even if the contracts in question are illegal under the Sherman Act and power to order affirmative acts abroad exists, it is an abuse of discretion to make such an order in the present case.

The appellant is a company with capital and surplus ranging in the ten years from 1940 through 1949 from $706,229.17 in 1941 to $1,859,313.41 in 1949. In 1948, the last full year before these proceedings were instituted, such net worth was $1,493.056.77. In the twelve years from 1940 through 1951, its gross sales of glassware averaged $1,568,112.39 with the high point coming in 1951 at $2,973,520.98. The gross sales of glassware in 1948 were $2,091,962.61. Thus it is indisputable that we are dealing with a small company.

Appellant's prismatic glassware is made essentially for use by its engineering department. All of appellant's salesmen are lighting engineers. Its real product is engineering service in scientific lighting. Seventy-five per cent of its sales are made as a result of appellant's engineering service. Thus to sell effectively the unbranded or newly-marked glassware which paragraph XI A of the judgment and decree requires to be available for sale in the territories of Limited and Francaise, appellant would have to send sales engineers into those territories or virtually waste *ab in itio* all of the expense of die making, production and advertising otherwise required by the decree. This amounts to the imposition of a penalty in a civil case without statutory authority.

The penal nature of the requirement that Holophane Company, Inc., sell its products in the territories of Limited and Francaise is heightened by the fact that such sales

would expose appellant to litigation in foreign courts where the decree of the District Court would be no defense. Limited holds a designation of agent for service of process from appellant. Furthermore such compulsory selling abroad would create receivables for appellant upon which an in rem judgment for damages could be predicated or from which a judgment could be satisfied. A court in England or France would be faced with a clear violation of the plain terms of the agreement in question. The unilateral cancellation of the contracts by the District Court would be no protection. The ultimate result would be to expose a small American company to the hazards of asserting a defense untenable in the courts of England or France. This would be a penalty out of all proportion to the alleged wrong to be corrected.

An order requiring affirmative acts abroad in foreign commerce by an American corporation in violation of contracts between that corporation and foreign companies not before the court reaches sensitive areas of international relations. Even if power to order such acts exists, the judicial process is not adapted to resolve the problems presented by such a decree. American courts can neither enforce such an order effectively nor protect a defendant honestly trying to comply. On the one hand, the American party may be in contempt for failure to obey such an extraterritorial order. On the other hand, it may be subjected to litigation abroad if it tries to obey. The judicial approach leaves no middle ground. The harshness of its impact and the limitations upon its effectiveness should deter a court from applying the power here assumed, especially against a company of the size and relative market insignificance of appellant. Judicial self-restraint dictates forbearance.

ARGUMENT.

I. THE BARE FACT OF TERRITORIAL AND RELATED RESTRICTIONS BETWEEN APPELLANT AND THE HOLOPHANE COMPANIES OF ENGLAND AND FRANCE DOES NOT PER SE RENDER THE CONTRACTS BETWEEN THEM VIOLATIVE OF SECTION 1 OF THE SHERMAN ACT.

Whatever may be the rule with reference to domestic commerce, per se illegality cannot be arbitrarily attached to all contracts imposing territorial and related restrictions in foreign commerce with foreign corporations. Three factors make the application of the doctrine of per se violation against the defendant improper. First is the fact that foreign trade and foreign corporations are involved. Second is the background of common ownership or control by a single individual of the three corporations which framed the agreements criticized. Third is the small size and relatively insignificant position of the appellant in the relevant market.

The above approach rests upon an examination of the cases applying the per se doctrine which reveal that market dominance was either presumed or expressly found to exist whenever the doctrine was applied. In the context of foreign commerce and contracts with foreign corporations by an American defendant, this case presents the precise question whether per se illegality *can* be found under Section 1 of the Sherman Act where the record affirmatively discloses that the defendant lacked the size, power and purpose to affect materially any substantial portion of the relevant market. Appellant takes the position that to hold such a defendant in violation of Section 1 is improper under the language of the Sherman Act, under the intent of Congress when it passed the Act and under prior decisions of this Court.

Since the agreements here in issue are not illegal per se, it is incumbent upon the Court to examine the facts and circumstances of this case under the Rule of Reason. A highly lucid statement of the relevant criteria in such an examination was that made by Mr. Justice Brandeis in *Board of Trade of the City of Chicago v. United States*, 264 U. S. 231:

> "* * * [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant factors. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. * * *" (l. c. 238.)

A. The Fact that Foreign Commerce and Foreign Corporations Are Involved Requires Consideration of the Circumstances Under Which the Agreements Challenged Were Made.

Where both foreign and domestic corporations are involved, as opposed to American companies alone, a series of problems is presented which do not permit application of the doctrine of per se illegality. New factors are injected by reason of the presence of foreign corporations and foreign commerce. Since contracts such as those here involved may be legal under foreign law, should such agreements be held per se invalid when they have slight effect, if any, upon the foreign and domestic commerce of the United States? Should not the Court inquire into the size and market position of the party charged with the violation? Should not the Court inquire into the validity or in-

validity of the agreements in foreign countries and the effect of a declaration of per se illegality in this country on those agreements under the law of nations?

No proof shows that the contracts purportedly cancelled by paragraph V of the judgment and decree are not still binding in England and France. The presumption is that the contracts are legal in each of those countries.

> "There is no presumption that the statutory law of another state is the same as that of the forum."
>
> *Restatement, Conflict of Laws*, § 623 (1934).

> "If the law of another state is not based on the common law, the court at the forum will not presume the foreign law to be like that of the forum."
>
> *Restatement, Conflict of Laws*, § 622, comment *b*, (1934).

Thus as to both England and France no presumption of identity of law aids the plaintiff in urging the effectiveness of the unilateral cancellation of contracts by the District Court involving rights of foreign corporations not subject to the jurisdiction of the Court.

Without extending the discussion of English law at this time, the following cases make it clear that contracts of the type complained of are wholly legal in England.

Mogul Steamship Company v. McGregor, Gow & Co., [1892] A. C. 25 (1891);

North Western Salt Company, Limited v. Electrolytic Alkali Company, Limited, [1914] A. C. 461;

Ware and De Freville, Limited v. Motor Trade Association, [1921] 3 K. B. 40 (1920);

Sorrell v. Smith, [1925] A. C. 700;

Thorne v. Motor Trade Association, [1937] A. C. 797.

In the *Mogul Steamship* case rival ship owners injured by a combination of other shippers were held to have no cause of action under the facts summarized by Lord Halsbury, L. C., as follows:

> "An associated body of traders endeavour to get the whole of a limited trade into their own hands by offering exceptional and very favourable terms to customers who will deal exclusively with them; so favourable that but for the object of keeping the trade to themselves they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves." (l. c. 35.)

Thus it is clear that Limited, the vendor, was acting within legal concepts of total propriety in England, that no presumption of illegality can attach to the agreements in France and that the problem of applying our antitrust laws to appellant must be approached with frank cognizance of the fact that valid contractual rights in Limited and Francaise survive the action of the District Court.

A clear perception of the complications arising in the application of the Sherman Act when foreign trade and foreign corporations are involved is shown in the *Report of the Attorney General's National Committee to Study the Antitrust Laws* (1955).*

> "* * * [T]he Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such substantial anticompetitive effects on this country's 'trade or commerce * * * with foreign nations' as to constitute unreasonable restraints." *Ibid.* 76.

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* See also, Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139, 1175-78 (1952).

B. The Background of Common Ownership or Control of Appellant, Limited and Francaise by Otis A. Mygatt Renders the Application of the Doctrine of Per Se Illegality Unreasonable.

The facts show that Holophane Glass Company, Inc., the New Jersey corporation purchased by independent American interests in 1925, was until then a wholly-owned subsidiary of Limited (R. 702). Limited was controlled by Otis A. Mygatt who also controlled Francaise (R. 702). Through Limited and Holophane Glass Company, Inc., Mr. Mygatt also controlled the Holophane company operating in Canada as a subsidiary of American Holophane (Govt. Ex. 4; R. 53, 121). Mr. Mygatt therefore controlled the Holophane enterprise throughout the world with patent and trade-mark rights in the large manufacturing and commercial nations of the Western Hemisphere.

Francaise and Limited were bound by their 1921 patent agreement not to sell in each other's territory and to exchange information on new developments, patents, trademarks and the like (R. 702). A representative of Limited went on the board of directors of Francaise (Govt. Ex. 7A; R. 53, 146). The essential aspects of the 1921 agreement between Limited and Francaise still obtain (R. 702).

Clauses in various contracts making English law applicable and requiring the appointment by the non-British party of an agent for service of process in England show the dominant position occupied by Limited in negotiations (Govt. Ex. 3, 7, 11, 12; R. 53, 119, 151, 180, 183). This is borne out by Mr. Franck's sharp characterization of Limited's negotiating technique in 1943 when he wrote his colleague, Mr. Liberman, about the June, 1925 agreement made in Liberman's name as a matter of form and assigned to appellant (Govt. Ex. 105 [A-37]; R. 97, 34-35). Mr. Franck wrote that mention of the June, 1925 agree-

ment was "* * * just like 'waving the red flag before the bull' * * *" to him. He explained in then contemporary terms that the agreement reminded him

> "* * * somewhat of the Nazi terms laid down to occupied territories. We had nothing to say or, rather, all my objections against the terms of this agreement were purely and simply over-ridden in an arbitrary way by Thompson, representing the English company. He dictated the terms as a conqueror these days does, contrary to what the United Nations consider as fair and equitable decisions." (Govt. 105 [A-37]; R. 97, 35.)

It is therefore plain that without the territorial restrictions in the 1925 trading agreement between Limited and appellant, there would never have been an independent American Holophane company.

Not only is the foregoing clear as a matter of fact but it also is clear as a matter of English law that Limited had a right to impose territorial and related restrictions incident to the sale of its American subsidiary. Nothing should have compelled Limited to create a competitor by the sale. Nothing should have required that the new American company be immediately faced with competition from its vendor.

In *United States v. Addyston Pipe & Steel Company*, 85 Fed. 271 (C. C. A. 6, 1898) Judge Taft (later Mr. Chief Justice Taft) set out certain recognized exceptions to the common law rule against restraint of trade and indicated that they were likewise exceptions under the Sherman Act. Judge Taft said:

> "The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V., folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of

trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. * * * Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. * * *" (l. c. 280-81.)

Judge Taft recapitulated as follows:

"For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. * * *" (l. c. 281.)

Plainly categories (1) and (4) are applicable to the sale of Holophane Glass Company, Inc., to appellant by Limited. Thus under the *Addyston Pipe* case which pre-

ceded the initial expression of the Rule of Reason by Mr. Chief Justice White in *Standard Oil Company of New Jersey v. United States*, 221 U. S. 1, and *United States v. American Tobacco Company*, 221 U. S. 106, it would seem that no undue restraint of trade existed and that even world-wide territorial divisions were properly ancillary to the sale of a unit by the original owner of the world-wide Holophane enterprise. Under the Rule of Reason, the background of prior common ownership not only explains historically how the territorial and related restrictions came to be but also demonstrates graphically how impossible it would have been for appellant to have gained independent status without accepting such provisions.

C. Neither the Size Nor the Market Position of Appellant Justify a Conclusion of Unreasonable Restraint of Trade.

The business or relevant market to which any restraint here existing is applied is prismatic glassware. Although the Government has proceeded along the line that Holophane glassware is a market in itself and that restraints upon foreign trade exist within that market, no proof of the existence of such a market was offered. There is no such market. *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377. Indeed the Government objected to any evidence on the size of the appellant and its relative position in the prismatic glassware market (R. 75-76). The explanation of Government counsel was that

> "* * * Section 1 brands as illegal the character of the restraint and not the amount of the restraint, so the amount of interstate or foreign commerce which is actually involved is not material * * *." (R. 75.)

In other words the Government has taken a flat per se approach to attempt to establish a right of relief.

The size of appellant has been detailed heretofore. In summary, its highest figures in the twelve years 1940 through 1951 for gross sales of prismatic glassware and gross total sales occurred in 1951 with glassware sales just under $3,000,000 and total sales just under $4,680,000 (R. 93-94, 96-97). The highest figure for capital and surplus in the ten years 1940 through 1949 occurred in 1949 when it reached just under $1,860,000 (Govt. Ex. 104; R. 94-96, 467). These figures in themselves show the relatively small position appellant occupies in the prismatic glassware field even without proof of the total sales in the market.

At least two of the competitors of appellant are very large.* Corning Glass Works had net sales of $115,750,172 in 1951 and $157,663,837 in 1955. *Moody's Industrial Manual,* 1956, pp. 1005-6. In 1949 Corning's capital stock and surplus was $28,926,358; in 1955, $78,306,280. *Id.* at 1007. Libbey-Owens-Ford Glass Company is even larger. Its net sales in 1951 were $176,164,620 and $281,-543,736 in 1955. *Id.* 2376. In 1949 Libbey-Owens-Ford's capital stock and surplus was $65,469,284; in 1955, $129,-631,264. *Id.* at 2377.

Nothing in the record indicates any market dominance in appellant. Even in street lighting, it has wide competition and is no more than a 3 per cent factor. Street lighting is only 15 per cent of appellant's total billings. This is in stark contrast to the so-called cartel cases which have been decided since the close of World War II.

In *Timken Roller Bearing Co. v. United States,* 341 U. S. 593, the defendant in a Section 1 case produced be-

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* Corning Glass Works and Libbey-Owens-Ford Glass Company are listed as two of the "major glass companies" in "Greatest Year for Glass" by Francis Bello in *Fortune,* May, 1955, page 132.

tween 70 and 80 per cent of the American output of tapered roller bearings and 25 per cent of all antifriction bearings produced in the United States. (l. c. 603-04.)

In *United States v. National Lead Co.*, 332 U. S. 319, National Lead and du Pont which controlled about 90 per cent of domestic production of titanium products between them were found to have violated Section 1. (l. c. 347.)

In *United States v. Aluminum Company of America*, 148 F. 2d 416 (C. C. A. 2 1945), defendant Alcoa produced 90 per cent of the virgin aluminum in this country and was found to have violated Section 2 (l. c. 432). A foreign defendant, which was a member of an international cartel controlling 89 per cent of non-domestic production, was found to have violated Section 1. (l. c. 445.)

In *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S. D. N. Y. 1951), a Section 1 case, nylon was found to be wholly a du Pont development and to be protected by product and process patents throughout the world. (l. c. 552.) It therefore had 100 per cent of the market in nylon.

In *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950), American manufacturers of coated abrasives with 86 per cent of the American export trade were held to have violated Section 1 by combining to establish jointly-owned facilities abroad. (l. c. 962.)

In *United States v. General Electric Co.*, 82 F. Supp. 753 (D. N. J. 1949), the complaint alleged violations of Sections 1 and 2 in connection with incandescent lamps. General Electric was found to have 55 per cent of the domestic market in lamps. (l. c. 893.)

The foregoing list of cartel cases in the past decade shows that domination of the domestic market has been

an unvarying hall-mark and that such comments as have been made upon per se violations stemming from territorial allocations with foreign competitors have been made in that context. Absent such domination a totally different problem is presented.*

As in the cartel cases, those cases involving domestic commerce where the per se doctrine has been applied also disclose that the defendant enjoyed actual or potential power to control a substantial part of the market. The following list of representative per se cases demonstrates the validity of the above statement, with the amount or per cent of control over the relevant market indicated. *United States v. Trenton Potteries Company*, 273 U. S. 392, 394 (82 per cent); *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 191 (83 per cent); *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U. S. 457, 462 (defendants occupied "commanding position" in their industry); *International Salt Co., Inc. v. United States*, 332 U. S. 392, 394 (defendant largest producer of salt for industrial uses); *United States v. Line Material Co.*, 333 U. S. 287, 290 (substantially all of relevant product); *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 167-68 (17 per cent of theatres accounting for 45 per cent of total domestic film rental); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (80 to 90 per cent —alleged in bill of complaint).

The primary factor motivating the introduction and passage of the Sherman Act was the enormous size and high degree of dominance of various markets by a small

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* *The Report of the Attorney General's National Committee to Study the Antitrust Laws* 26 (1955), notes in its review of cases dealing with market division agreements that "[a]ll these cases concern arrangements affecting large fractions of market supply."

number of business organizations. See, THORELLI, THE FEDERAL ANTITRUST POLICY, 180-81 (1954) (quoting Senator Sherman).* Albert H. Walker, in his treatise HISTORY OF THE SHERMAN LAW (1910) indicates, at page 56, that it was the intent of Congress to strike down those restraints of trade or commerce which are "extensive enough to be materially injurious to public or to private welfare."

When viewed in this frame of reference, the reasons why courts have placed emphasis upon market power become manifest. To the extent that a rule under which certain actions are denominated unlawful per se has been adopted, the courts have effectively foreclosed a defendant from presenting further evidence which might tend to show that the actions in question could not possibly have had an injurious effect upon a material portion of the relevant market. Therefore, to justify a finding of per se illegality, it was and is necessary first to ascertain whether a restraint could have the undesirable effect prohibited by the Sherman Act.

Here the facts show that appellant lacked the size, financial or business capacity, and market position to cause any significant or substantial restraint upon competition in foreign trade and commerce in prismatic glassware. Accordingly, no finding of a per se violation of Section 1 of the Sherman Act is proper. Under these circumstances it was incumbent upon the District Court to examine the allegedly unlawful acts in the light of the Rule of Reason. So examined, the agreements in issue do not impose any unreasonable restraint upon competition.

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* See, generally, HOLBROOK, THE AGE OF THE MOGULS (1953).

II. JURISDICTION IN PERSONAM SOLELY OVER APPELLANT AS THE AMERICAN MEMBER OF AN ILLEGAL CARTEL ARRANGEMENT DOES NOT GIVE THE DISTRICT COURT POWER TO ORDER AFFIRMATIVE BUSINESS ACTS ABROAD IN VIOLATION OF THE TERMS OF THE CONTRACTS BETWEEN APPELLANT AND THE HOLOPHANE COMPANIES OF ENGLAND AND FRANCE.

Even assuming illegality of the contracts under the Sherman Act, a basic question exists as to the power of the District Court to compel appellant to sell abroad contrary to the agreements with Limited and Francaise. Despite the wholly unilateral nature of its action dissolving the contracts listed in paragraph V of the judgment and decree, the District Court has acted as though such dissolution were unquestionably binding upon Limited and Francaise who were not parties defendant.

The intensity of this misconception of jurisdiction to abrogate provisions relating to contract rights is illustrated by putting it in juxtaposition to the foreign patent and trade-mark rights held under foreign statutory law. The decree originally proposed by the Government did not cover possible conflict with foreign patents in paragraph XI A (R. 626). In response to criticism, Government counsel offered to amend their proposed decree to eliminate any requirement that appellant ship abroad in violation of valid patent rights of Limited or Francaise (R. 686-87). The amendment was made and embodied in the judgment and decree entered by the Court (R. 692, 698). Thus the lack of power in the District Court to violate the legal rights of Limited and Francaise in patents and trademarks was uniformly recognized.

The method of protecting patent and trade-mark rights is in the teeth of the contracts purportedly cancelled because such agreements not only require the communica-

tion of patents and trade-marks adopted by appellant to Limited and Francaise and their assignment if desired but also include unbranded or newly-marked products within their scope (Govt. Ex. 3; R. 53, 119; Govt. Ex. 12; R. 53, 183). The inconsistent position of the District Court in recognizing statutory legal rights of foreign corporations so clearly on the one hand and disregarding their contractual legal rights so plainly on the other is in itself evidence of the impropriety of the effort to assert a jurisdiction which inherently cannot exist.

A. The Order of the District Court Requiring Appellant to Perform Affirmative Acts Abroad Violates the Principles of the Law of Nations Recognized by this Court.

From the earliest days of this Court the law of nations has been considered to be a part of our law. In *Ware v. Hylton,* 3 U. S. (3 Dall.) 199, Mr. Justice Wilson remarked:

> "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. * * *" (l. c. 281.)

In *The Charming Betsy,* 6 U. S. (2 Cranch) 64, the Court passed upon the question whether an American vessel sold to an expatriated American who had become a citizen of Denmark could be seized for violating a law of 1800 forbidding commercial intercourse with France. In the course of the opinion Mr. Chief Justice Marshall (one of defeated counsel in *Ware v. Hylton**) said:

> "* * * It has also been observed, that an act of congress ought never to be construed to violate the law of na-

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* See II, BEVERIDGE, THE LIFE OF JOHN MARSHALL 186-96 (1916). For additional discussion of Mr. Chief Justice Marshall's work in international law, see, Dumbauld, *John Marshall and the Law of Nations,* 104 U. Pa. L. Rev. 38 (1955).

tions, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country. These principles are believed to be correct, and they ought to be kept in view, in construing the act now under consideration." (l. c. 118.)

In *The Apollon,* 22 U. S. (9 Wheat.) 159, the Court considered the propriety of the seizure of a French ship passing through American waters on her way to a Spanish port. In ruling that such passage was not arrival within the limits of the United States so as to support a tonnage tax, Mr. Justice Story said:

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction. * * *" (l. c. 162.)

More recently it has been declared that the law of nations is a part of our law. *The Paquete Habana,* 175 U. S. 677; *Skiriotes v. Florida,* 313 U. S. 69. Without denying the power of Congress to adopt a statute contrary to the law of nations, it cannot be assumed on the background detailed that such a violation was intended without the clearest expression of Congressional intent. Hence it must be taken that the Sherman Act ought to be construed to be consistent with, not violative of, the law of nations.

Such a construction of the Sherman Act would require a decree by the District Court in conformity with the limits of the statutory law granting the power, i.e., the Sherman Act subject to international law. *Cf., People ex*

rel. Van Dyke v. Colorado Central Ry. Co., 42 Fed. 638 (C. D. Colo. 1890). Although Section 4 of the Sherman Act clothes district courts with power to restrain violations of the Act, Section 4 grants no novel or additional equity powers. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344; *De Beers Consolidated Mines, Ltd. v. United States*, 325 U. S. 212.

The rule or fundamental concept of the law of nations violated by the District Court decree herein is illustrated by the following:

> "The first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State." The Case of the S. S. "Lotus," P. C. I. J., Ser. A, No. 10 (1927), p. 18.
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> " 'No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations * * *' " I OPPENHEIM, INTERNATIONAL LAW 204 (2d ed. 1912).
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> "A state has jurisdiction over its nationals or domiciliaries wherever they may be to require or forbid them to do an act unless the exercise of this jurisdiction involves the violation of the law or public policy of the state where the national or domiciliary is." *Restatement, Conflict of Laws* § 63 (1948 Supp.)
>
> "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed." *Restatement, Conflict of Laws* § 94 (1934).

This Court has recently recognized "the first and foremost restriction imposed by international law" mentioned above in *Steele v. Bulova Watch Co., Inc.*, 344 U. S.

280. In holding that an American citizen could be subject to suit here under the Lanham Trade-Mark Act of 1946 for infringement and unfair competition consummated in a foreign country, the Court pointed out that the foreign registration of the trade-mark in question had been nullified by its highest judicial body and said:

> "* * * Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction * * *." (l. c. 289.)

A footnote to the above citation included reference to *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.* discussed below at pages 48 to 52. See also, Whitney, *Sources of Conflict Between International Law and the Anti-Trust Laws*, 63 Yale L. J. 655, 658 n. 8 (1954).

A specific application of the foregoing principle in a Sherman Act case was made by this Court in *American Banana Company v. United Fruit Company*, 213 U. S. 347. In holding the acts there involved not to be within the scope of the Sherman Act, this Court, speaking through Mr. Justice Holmes, pointed out that they occurred in Panama and Costa Rica and said further:

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress." (l. c. 355.)

The Court continued:

> "* * * But the general and almost universal rule is that the character of an act as lawful or unlawful must be

determined wholly by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. This principle was carried to an extreme in *Milliken v. Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; Dicey, Conflict of Laws (2d ed.), 647. See also Appendix, 724, 726, Note 2, *ibid.*" (l. c. 356.)

The Court concluded:

"The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. 'All legislation is *prima facie* territorial.' *Ex parte Blain, In re Sawers*, 12 Ch. Div. 522, 528; *State v. Carter*, 27 N. J. (3 Dutcher) 499; *People v. Merrill*, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. * * *" (l. c. 357.)

The inherently territorial nature of legislation is clearly recognized in the British Empire. This is illustrated in *Sirdar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A. C. 670. The case involved the right of a court of

Faridkote, a State of the Punjab, to render *ex parte* decrees against a resident of Jhind, another such State. In reversing the decrees below and holding them a nullity, the Earl of Selbourne spoke for the court as follows:

> "* * * All jurisdiction is properly territorial, and 'extra territorium jus dicenti, impune non paretur.' Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners, who owe no allegiance or obedience to the Power which so legislates." (l. c. 683-84.)

The judgment and decree violates the law of nations in two signal respects. In the first place it seeks and purports to deprive Limited and Francaise of valuable rights under their contracts with appellant when neither Limited nor Francaise was before the Court. This is in effect like the *ex parte* decrees issued by the court of Faridkote against the resident of Jhind. Such interference with rights valid under the municipal law of England and France is clearly an attempt to exercise power in another State.

In the second place the judgment and decree violates international law because it is essentially an attempt by

the District Court to thrust the economic concepts of the antitrust laws upon markets and territories outside the United States. It is highly improper for this country to try to enforce a policy of free markets in foreign territory where our statutes are not operative and in which the public policy of the sovereign is not in accord with our notions of free competition. American courts should not be permitted to impose upon other nations policies which those nations are not interested in or regard as undesirable. Failure to recognize the limitations of international law constitutes an act of judicial aggression which the nations exposed thereto might justly resent.

B. The Agreements Here Challenged Were Legal Under English Law.

Shortly after the adoption of the Sherman Act, *Mogul Steamship Company v. McGregor, Gow & Co.*, [1892] A. C. 25 was decided. The House of Lords affirmed decisions below for the defendants in a suit for damages by shipowners injured in the China tea trade by an association of shipowners who agreed on rates and rebates with an aim to cutting off competition from outsiders, holding that the object of defendants was the lawful one of extending their trade and increasing their profits and that no unlawful means were used.

In *North Western Salt Company, Limited, v. Electrolytic Alkali Company, Limited*, [1914] A. C. 461 a combination of salt manufacturers sued to recover damages for breach of contract. Plaintiff was formed to regulate the supply of salt and keep up the prices. It had practical control of the inland salt market. Defendant was not a member of the combination but agreed to sell plaintiff a specific tonnage of salt per year for a term at a fixed price and

not to make any other salt for sale. Defendant sold salt in violation of the agreement. Because of the starkness of the arrangement, the Court of Appeal by a 3 to 1 vote held the contract to be an illegal restraint of trade. The House of Lords reversed and held the contract not illegal on its face. Lord Chancellor Haldane showed the wide difference between the Sherman Act and the British point of view when he said:

> "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. * * *" (l. c. 469.)

Later cases expressing the same attitude are: *Ware and De Freville, Limited v. Motor Trade Association,* [1921] 3 K. B. 40 (1920); *Sorrell v. Smith,* [1925] A. C. 700.

One of the latest English cases in this field is *Thorne v. Motor Trade Association,* [1937] A. C. 797. Plaintiff, a member of defendant trade association, sued for a declaratory judgment and an injunction. The declaration sought questioned the right of the association to fine members selling below a price list or to put such members on a "Stop List" or blacklist. Both the Court of Appeal and the House of Lords sustained the right of the association to impose the disciplines indicated.

The British Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948 (11 & 12 Geo. 6, 1948, c.

66) in no way undermines these cases.* See Comment, *The British Monopolies Act of 1948: A Contrast with American Policy and Practice*, 59 Yale L. J. 899 (1950); Meier, *A Critique of the New British Monopolies Act*, 48 Mich. L. Rev. 329 (1950). See also, *British Motor Trade Association v. Salvadori*, [1949] Ch. 556, in which the *Thorne* case was applied.

C. The Established American Rule Recognizes that Antitrust Laws Have No Extraterritorial Effect.

Mr. Justice Holmes' quotation in *American Banana Company v. United Fruit Company*, 213 U. S. 347, 357 "* * * 'All legislation is *prima facie* territorial.' * * *" has been reflected repeatedly in the decrees and orders of American courts in antitrust cases.

In 1945 this Court in *Hartford-Empire Co. v. United States*, 323 U. S. 386, recognized that our antitrust laws do not apply to acts wholly outside this country even by American companies. The Court said:

> "Paragraph 1 (D) should be modified to limit its coverage to the United States, and clause (a) should be stricken as too indefinite for enforcement." (l. c. 410.)**

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* Because the references to English law so thoroughly document the conflict between the Sherman Act concept of restraint of trade and foreign law, no detailed study of the law of France has been made. Nothing indicates that the French law agrees with our own and the presumption is otherwise. In fact the French law appears to be similar to the English. See FRIEDMANN, ANTI-TRUST LAWS 91-138 (1956).

** Paragraph 1(D) of the final judgment entered by Judge Kloeb of the District Court on October 8, 1942, in *Hartford-Empire Company v. United States* read as follows before modification by this Court:

> "(D) Except when otherwise expressly provided herein, whenever reference is made to any corporation, whether or

(Continued on next page)

In *United States v. Aluminum Co. of America,* 148 F. 2d 416 (C. C. A. 2 1945), Judge Learned Hand said:

> "* * * as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this [Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers: limitations which generally correspond to those fixed by the 'Conflict of Laws.' * * *" (l. c. 443.)

In *United States v. General Electric Co.,* 82 F. Supp. 753 (D. N. J. 1949), 115 F. Supp. 835 (D. N. J. 1953) the court had to frame the relief to be granted against N. V. Philips' Gloeilampenfabrieken, a Dutch corporation, over which the court obtained jurisdiction in personam through service upon its executive officers present in this country during World War II. In the opinion on remedies (115 F. Supp. 835), the final judgment entered by the District Court is set forth with remarks upon its several parts. Section XI A of that judgment is as follows:

> "Philips shall not be in contempt of this Judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated, chartered or organized or in the territory of which

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(Continued from preceding page)

not engaged in the manufacture of glassware or of machinery to be used in the manufacture of glassware, such reference shall be deemed to include, in addition to the corporation referred to, any corporation engaged in the manufacture of glassware or of machinery to be used in the manufacture of glassware which (a) is controlled, directly or indirectly, through stock ownership or otherwise by the corporation referred to or (b) is a subsidiary, successor, parent, or subsidiary of a parent of the corporation referred to." (Transcript of Record, Vol. X, p. 7655.)

> Philips or any such subsidiaries may be doing business. In any such case, Philips shall advise the plaintiff thereof as promptly as is practical and thereupon the plaintiff may apply to the Court, with full opportunity to the defendant Philips to be heard for such relief consistent with the provisions of this Judgment as the Court may deem proper." (l. c. 878.)

In commenting on the provision just quoted, Judge Forman said:

> "Paragraph A is proposed by Philips as a safeguard to its protection from being caught between the jaws of this judgment and the operation of laws in foreign countries where it does its business. It appears warranted for this purpose and has accordingly been incorporated in the judgment." (l. c. 878.)

Earlier cases in which district courts recognized the territorial limitations upon the reach of the antitrust laws are *United States v. 383,340 Ounces of Quinine Derivative*, Admiralty No. 98-242 (S. D. N. Y. 1928) and *United States v. Deutsches Kalisyndikat Gesellschaft*, Equity No. 41-124 (S. D. N. Y. 1929). Both involved foreign cartels and alleged monopolization, the former of quinine, the latter of potash. Sales of the product were effected in the United States in each instance.

In the *Quinine* case the decree included the following:

> "(f) Provided, however, that nothing herein contained shall be construed to restrain or prohibit any defendant from doing any act or entering into any agreement which is entirely completed outside the United States and which does not require any act or thing to be done within the United States."

In the *Potash* case the court accepted the fact that our law cannot compel foreigners to compete for our business:

"(4) Provided that no provision of this decree shall be construed to prevent defendants from selling and delivering all or any part of their potash salts outside of the United States to a corporation organized under the laws of any country other than the United States regardless of any stock ownership or other interest in said corporation by any or all of the parties hereto; or to prevent said corporation from selling and distributing in the United States such potash salts so acquired * * *"

The judgment and decree below contrasts with the unequivocal acceptance of territorial limitations over acts of the defendants in the *Potash* case. Here counsel for the Government advanced as a reason for compelling sales abroad by appellant under paragraph XI A, the fact that Limited and Francaise may be stirred to enter the American market (R. 670). Government counsel suggested that when the

"* * * active hostility, perhaps, by the defendant, in selling abroad comes to the attention of Francaise and Limited, they may welcome the opportunity to break down this close collaboration that has existed and take advantage of the opportunity to compete in the American market." (R. 675.)

In other words, counsel for the Government wish to force retaliation by Limited and Francaise, when they feel the impact of appellant's compulsory selling abroad.

The sensitive perception reflected by this Court and others against giving our antitrust laws extraterritorial application is in contrast with the comment of the District Court:

"* * * It is a question of justice, after all, as to how far the Court should go, and I don't think the Court will be unduly influenced by any threats from England or France, or anything to the contrary." (R. 691.)

The "threats from England" were expressions from Limited through the chairman of its board of directors and its solicitors by letter and cable that the agreements between Limited and appellant "* * * are governed by English law" and that "* * * all possible steps in courts concerned to restrain" will be taken if appellant acts within Limited's territory (R. 680-82). The "threats from * * * France" refer to the statement by counsel for appellant that similar letters had been received from Francaise (R. 684).

The foregoing provides an introduction to the problems presented in the complex of cases entitled *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S. D. N. Y. 1951), 105 F. Supp. 215 (S. D. N. Y. 1952), (on decree) and *British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd.*, [1953] Ch. 19 (C. A. 1952), [1955] Ch. 37 (1954). The District Court found Imperial Chemical Industries, Ltd. (I. C. I.) and others to have violated Section 1 of the Sherman Act by international agreements dividing territories among other things on nylon. I. C. I., over which the Court had in personam jurisdiction, was ordered to re-assign English patents on nylon to E. I. du Pont de Nemours & Co. I. C. I. had granted an exclusive license under the British patents to British Nylon Spinners, Ltd. (B. N. S.). In the earlier British citation an interlocutory order was approved by the Court of Appeal restraining the defendant I. C. I. from complying with the order of the District Court of the Southern District of New York.

The Master of the Rolls, Sir Raymond Evershed, immediately recognized the presence of the question of extraterritoriality. During argument he said:

> "The American court assumes jurisdiction in personam against a party amenable to its jurisdiction to

compel it by contract to modify the rights which the law of another country confers on it in that other country. Moreover, the order is to take effect notwithstanding the plaintiffs' rights. If they have in equity a right to specific performance against the defendants, does not the order in form purport to interfere with the municipal law of England? We may have to consider to what extent we concede on grounds of the comity of nations extraterritorial jurisdiction to interfere with English patent rights." [1953] Ch. 19, 21.

Later in his opinion he continued:

"* * * It is plain that there is here a question of the comity which subsists between civilized nations. In other words, it involves the extent to which the courts of one country will pay regard and give effect to the decisions and orders of the courts of another country. I certainly should be the last to indicate any lack of respect for any decision of the district courts of the United States. But I think that in this case there is raised a somewhat serious question, whether the order, in the form that it takes, does not assert an extraterritorial jurisdiction which the courts of this country cannot recognize, notwithstanding any such comity. * * *" (l. c. 24.)

Referring to Judge Ryan's opinion in 105 F. Supp., Sir Raymond said:

"* * * It is plain that the judge considered this matter most carefully, and indeed, as Upjohn J. pointed out, expressed his own doubts whether, in giving effect as he felt it his duty to do, to the implications of the Sherman Act, he might not be going beyond the normally recognized limits of territorial jurisdiction. He said: 'It is not an intrusion on the authority of a foreign sovereign for this court to direct that steps be taken to remove the harmful effects on the trade of the United States.' If by that passage the judge intended to say (as it seems to me that he

did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign Power effective to remove (as he said) 'harmful effects on the trade of the United States,' I am bound to say that, as at present advised, I find myself unable to agree with it."

* * * * *

"On the other hand, there is no doubt that it is competent for the court of a particular country, in a suit between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction, to make orders in personam against one such party—directing it, for example, to do something or to refrain from doing something in another country affecting the other party to the action. As a general proposition, that would not be open to doubt. But the plaintiffs in this case (unlike Imperial Chemical Industries) are neither subjects nor nationals of the United States, nor were they parties to the proceedings before his Honour, nor are they otherwise subject to his jurisdiction." (l. c. 25.)

Referring to the contract rights which B. N. S. had against I. C. I., the Master of the Rolls said:

"* * * and it seems to me that the plaintiffs have at least established a prima facie case for saying that it is not competent for the courts of the United States or of any other country to interfere with those rights or to make orders, observance of which by our courts would require that our courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights." (l. c. 26.)

In a short concurring statement Lord Denning said:

"It would be a serious matter if there were a conflict between the orders of the courts of the United States and the orders of these courts. The writ of the United States does not run in this country, and,

if due regard is had to the comity of nations, it will not seek to run here * * *." (l. c. 28.)

After trial on the merits specific performance was ordered against I. C. I. and a permanent injunction issued. [1955] Ch. 37 (1954). The opinion of the Chancery Division was rendered by Mr. Justice Danckwerts, who said:

> "The question, therefore, is whether this judgment of the United States Federal Court provides a defence for I. C. I. in this action for specific performance, and whether by reason of that judgment I should refuse to grant specific performance of the contract which has admittedly been made between plaintiffs and the defendants." (l. c. 51.)

The court viewed the contract as being governed by English law.

> "The view * * * asserted by the Master of the Rolls seems to me to be entirely in accordance with the decision of the Court of Appeal in *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft,* in which du Parcq L. J. said: 'One starts with the rule that English law is the law which governs the performance of this contract. An elementary principle of English law is that people should keep their contracts and carry them out.' In that case the Court of Appeal gave judgment against a Hungarian bank on a claim by London bankers to recover a sum of money from the Hungarian bank, notwithstanding that legislation in Hungary made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank. In the case before me there is no doubt that English law is the law which governs the performance of the contract made by the plaintiffs and the defendants. Furthermore, in this case, both the parties are British nationals, and so in this respect the situation is easier than in *Kleinwort's* case, in which the defendant was a Hungarian bank." (l. c. 52.)

It is submitted that the *I. C. I.—B. N. S.* litigation demonstrates why the courts of this country have heretofore accepted the territorial limitations upon their power, thereby avoiding orders in antitrust cases which affront the municipal law of other nations. The order to perform affirmative acts abroad in this case is a new departure from those limitations. This Court should strike such order down as beyond the power of a district court.

III. THE ORDER COMPELLING AFFIRMATIVE ACTS ABROAD BY APPELLANT CONSTITUTES AN ABUSE OF DISCRETION.

A most grave abuse of discretion by the District Court is here involved. This is so even if an illegal restraint of trade is found and power to order affirmative acts abroad resides in the Court.

The relative insignificance of appellant as a factor in the prismatic glass market has been made plain. The giants against whom it must and does compete, have been described. Furthermore the rule of the law of nations against extraterritoriality and the specific reaction of the British courts to intrusion upon contractual rights valid under the municipal law of England have been demonstrated. All these factors converge to compel the conclusion that an abuse of discretion has occurred.

Without rehearsing ground covered heretofore, appellant submits further that there is an abuse of discretion because the affirmative acts ordered abroad in effect impose a penalty upon appellant and because the order of the District Court amounts to judicial intrusion into an area not properly the subject of consideration by the courts.

A. The Order to Act Affirmatively Abroad Imposes a Penalty on Defendant.

This Court has clearly held that the purpose of a decree in an equity suit under the antitrust laws is not punishment of the defendant. *Timken Roller Bearing Co. v. United States*, 341 U. S. 593, 602-03; *International Salt Co., Inc. v. United States*, 332 U. S. 392, 400; *United States v. National Lead Co.*, 332 U. S. 319, 338; *Hartford-Empire Co. v. United States*, 323 U. S. 386, 409-10.

In the *Timken* case when the question of divestiture was before the Court, Mr. Justice Reed said:

> "There are no specific statutory provisions authorizing courts to employ the harsh remedy of divestiture in civil proceedings to restrain violations of the Sherman Act. Fines and imprisonment may follow criminal convictions, 15 USC §1, and divestiture of property has been used in decrees, not as punishment, but to assure effective enforcement of the laws against restraint of trade." (l. c. 602-603.)

If the *Timken* decision ruled out divestiture as a proper form of relief on those facts, it is clear that this Court should now strike down "investiture" of this small company with international business it does not want and cannot afford. The imminence of litigation in the British courts if appellants sells in England is plain. An entry of appearance is already available so that jurisdiction in personam could be asserted. Litigation by Francaise is equally inevitable. If appellant is to sell effectively and recoup the investment imposed upon it to make newly-marked or unmarked glass, it must send trained sales engineers into England, France and the other areas of their territories. In addition to imposing great expense, the employment of sales engineers abroad in appellant's normal method of selling will heighten the likelihood of litigation by Limited

and Francaise and furthermore create a basis for in personam jurisdiction over appellant in France and elsewhere in Francaise's territory.

B. The Order Requiring Affirmative Acts Abroad Reaches Sensitive Areas of International Relations Not Suited to Judicial Action or Enforcement.

The impasse reached by those who heartily embrace the view of extraterritoriality for our antitrust laws has been articulately expressed as follows:

> "My effort tonight has been to give you a logically consistent, economically pertinent and morally justifiable account of the development of the law of extraterritorial jurisdiction over foreign defendants in antitrust cases. Success in such an endeavor does not, however, dispose of the problem which is of legitimate concern to Mr. Whitney,* myself and all of us—the

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* William Dwight Whitney, whose paper entitled "Anti-Trust Law and Foreign Commerce" is found at page 134 in 11 *The Record* following papers by Mr. Timberg, as cited above, and Leonard J. Emmerglick. Mr. Whitney says at pages 134 and 135:

"*American law today violates international law.*

"This subject is most important today in the international field, and I submit to you that the way that we are enforcing the American law today violates international law, is increasing our unpopularity abroad, and is hamstringing American business.

"Any trade between two nations must involve two systems of law. They must be in conflict unless reconciled by international law. Our whole American policy in foreign affairs is to avoid conflict, and accordingly we must subject ourselves to international law. International law is not theoretical; it is the rule or working means by which international conflict is avoided, above all in the field of trade and commerce.

"*International law is territorial.*

"The one essential rule of international law is that each country applies its own law in its own territory. It is su-

(Continued on next page.)

problem of what to do when the antitrust public policy of the United States comes into direct conflict, in a courtroom, with the more restrictive policies tolerated or pursued by other national sovereigns. The trouble with such conflicts is that they are resolved on a winner-take-all basis—either the Sherman Act prevails, or it bows to the more pro-cartel public policy of a foreign land. Under the presently operating rules, such conflicts are largely resolved on the basis of which court happens to be seized of jurisdiction over the parties and the importance attributed by that court to its own national public policy in the matter. One need only look at the recent history of the *DuPont-I. C. I.* case in this country and the *Nylon Spinners* case in the United Kingdom for factual confirmation of these points.

"Under the present judicial system there is no way out. Mr. Whitney has appealed to Congress for a legislative amendment repealing the Sherman Act in its practical application to wide sectors of U. S. foreign trade. I have been connected with a project, originally promoted by our State Department, looking to the development of international machinery which, without affecting the enforcement of the Sherman Act in appropriate cases, could conceivably work out compromise solutions that would relieve businessmen engaged in U. S. foreign trade from the pincer movement in which they are currently caught. Given

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(Continued from preceding page)

preme in its own territory, and the laws of other nations have no place there. It would be just as proper under international law for English or Turkish or Russian law to govern New York contracts as it is for American law to attempt to govern contracts made and to apply in those countries.

"International law is not a highly complex set of rules under which all the different laws of the different countries can be mingled together and made to operate side by side. It lays down the simple principle that there is only one applicable law in each sovereign territory—its own law."

the attitude of the present State Department, however, this effort at elevating the antitrust sights of other countries and providing a fairer forum for the beleaguered American foreign trader is stymied."

Timberg, *Antitrust Problems in Foreign Commerce*, 11 The Record of the Association of the Bar of the City of New York 101, 118 (Mar. 1956). See also,

Timberg, *Restrictive Business Practices: Comparative Legislation and the Problems that Lie Ahead*, Am. J. Comp. L. 445 (Autumn 1953); Edwards, *Regulation of Monopolistic Cartelization*, 14 Ohio St. L. J. 252 (1953).

Each of the foregoing expresses the point of view that international agreement is the ultimate solution to conflicts between diverse national views on problems raised by cartels. This suggests that the judicial branch of the government is neither best nor properly suited to handle the problem even if the power to do so be assumed.

The *Report of the Attorney General's National Committee to Study the Antitrust Laws* contains much which confirms the position that the courts are ill-equipped to handle effectively problems arising under our antitrust laws when they come in conflict with the law of another sovereign nation which tolerates more restrictive business practices. The communications to the Committee from the Department of Defense, Department of State, Department of Commerce, Commission on Foreign Economic Policy and the Foreign Operations Administration make clear the existence of difficulties under the antitrust laws as presently enforced (pp. 92-98). Furthermore a vigorous minority report was made on the subject of an international mechanism for "* * * curbing undue restraints

of trade and monopolistic practices * * *" (p. 98). The majority felt that consideration of such a subject was beyond the scope of the *Report*. Speaking for the minority, Eugene V. Rostow urged approval of the United Nations Draft Articles of Agreement (pp. 98-105). In urging the necessity for such approval of the United Nations Draft, Mr. Rostow said:

> "* * * Occasionally our Courts can take effective jurisdiction over the program of a foreign cartel, and they can often weaken such cartels by forbidding American nationals and corporations to participate in them. But at best the Sherman Act can do a limited part of the job, and its enforcement with regard to non-residents, foreign corporations, or even foreign subsidiaries of American corporations is bound to create serious problems of international law, and significant political friction. Such friction must continue to arise so long as foreign law with respect to restraints of trade and monopoly differs so markedly from our own." (l. c. 100.)

This Court has indicated as much in *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, when it said:

> "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law." (l. c. 318.)

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the judgment and decree of the District Court should be reversed or, in the alternative, that those portions thereof purporting to cancel rather than enjoin compliance with the agreements specified in paragraph V and to order appellant to perform affirmative acts abroad in paragraph XI should be stricken.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 2

HOLOPHANE COMPANY, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the district court. The court's findings of fact and conclusions of law (R. 700–708) are reported at 119 F. Supp. 114.

JURISDICTION

The judgment of the district court was entered on February 8, 1954 (R. 693–700).[1] Appellant's timely motions (1) for a new trial, (2) to admit additional testimony, (3) for amendment of and additional findings of fact and conclusions of law, and (4) for alter-

[1] The judgment was amended pursuant to a stipulation which the court approved on February 9, 1955 (R. 715–718).

ing or amending the judgment (R. 708–713) were denied in all material respects on February 9, 1955 (R. 718). The notice of appeal was filed on April 9, 1955 (R. 718), and this Court noted probable jurisdiction on October 10, 1955 (R. 721). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTIONS PRESENTED

1. Whether agreements under which appellant and two foreign companies divided world markets and eliminated competition unlawfully restrained foreign commerce, in violation of Section 1 of the Sherman Act.

2. Whether a district court, upon finding that an American company has conspired with foreign companies (which are not before the court) to divide world markets and eliminate competition, in violation of Section 1 of the Sherman Act, has the power, in order to restore competition, to direct the American company to take reasonable steps to promote the sale and distribution of its products in the foreign territories which had been allocated to its co-conspirators.

3. If the court has such power, whether the provisions of the judgment which direct appellant to take various steps to compete abroad constitute a reasonable, and therefore permissible, exercise of judicial discretion.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209 (15 U. S. C. 1, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

A. THE PROCEEDINGS BELOW

This is a civil suit brought by the United States under Section 4 of the Sherman Act to enjoin violations of Section 1 of that Act. The complaint (R. 4–9), filed November 10, 1949, alleged that since 1925 appellant had been engaged in a combination and conspiracy, and had been a party to contracts, agreements and understandings, in restraint of interstate and foreign commerce in prismatic glassware and illuminating appliances. The alleged restraint was the division of world markets, and the elimination of competition, among appellant and two co-conspirators not named as parties, Holophane Limited ("Lim-

ited"), a British company, and La Societe Anonyme Francaise Holophane ("Francaise"), a French company.

Trial of the case before District Judge Mell G. Underwood took place on June 2 and June 4, 1952 (R. 51–109). The proof was primarily documentary; only two witnesses testified.[2] Both parties then filed proposed findings of fact and conclusions of law and a proposed form of decree (R. 621–662), and the court heard argument thereon (R. 663–692).

On February 8, 1954, the court filed its findings of fact and conclusions of law, holding that appellant had violated the Sherman Act as charged. In brief, the court found that appellant had entered into and carried out agreements with Limited and Francaise for the division of world markets, which "were designed to," and did, "eliminate competition between the parties and with outsiders" (Fdg. 19, R. 707); and that such agreements unreasonably restrain the interstate and foreign commerce of the United States. At the same time, the court entered its judgment (discussed in detail, *infra,* pp. 15–18), which cancelled the illegal agreements; enjoined appellant from effectuating them or from conspiring or combining to divide markets or to eliminate competition; and directed appellant to take certain affirmative steps, both here and abroad, designed to restore competition between it and its co-conspirators.

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[2] Appellant admitted a number of facts requested by the Government (R. 24–29, 38–40), and the parties stipulated certain other facts (R. 97–98).

Appellant does not directly challenge any of the district court's findings of fact, and there is no dispute between the parties as to the basic facts. The following statement is based on the court's findings, as supplemented by the uncontradicted documentary evidence in the record.[3]

B. APPELLANT'S BUSINESS

Appellant, a Delaware corporation whose factory is located in Newark, Ohio, is engaged in the manufacture and sale of prismatic glassware and illuminating appliances containing prismatic glassware (Fdg. 1, R. 700). Limited and Francaise (the co-conspirators) also are engaged in that business (Fdgs. 2, 3, R. 701). Prismatic glassware includes reflectors, refractors,[4] lenses and lens plates bearing configur-

[3] Prior to trial, the Government filed, pursuant to Rule 36 of the Federal Rules of Civil Procedure, 175 requests for admissions of the genuineness of certain documents, and also requests for admissions as to certain facts (R. 11–29). Appellant denied certain of the facts, but did not controvert the genuineness of any of the documents (R. 38–40).

At the trial, the Government introduced in evidence only 95 of the foregoing documents (R. 53), together with the request for admissions and appellant's answer thereto (R. 97). The Government also introduced in evidence nine other exhibits (GX 96–104, R. 96, 398–469) which were not part of the documents covered by the request for admissions. Appellant introduced 18 exhibits (R. 471–620) none of which was included in the request for admissions.

Appellant now relies on certain of the other documents whose genuineness it acknowledged (Br., p. 7, footnote). Since those documents were never admitted—or even offered—in evidence, they are obviously not a proper part of the record before this Court.

[4] A refractor is placed between the light source and the area to be illuminated; a reflector is placed behind the light source

ations or prisms in the form of circles or lines or both (Fdg. 5, R. 701). It is used to control the distribution and direction of artificial light (*ibid.*). Prismatic glassware incorporated into illuminating appliances may be used to direct artificial light to a small area or to diffuse such light over a wide area (*ibid*). Illuminating appliances containing prismatic glassware are highly efficient and effective means of lighting factories, offices, schools, stores, hospitals, art galleries and radio broadcasting stations (Fdg. 6, R. 701). Prismatic glassware also is used in transportation, marine, aviation, street and traffic lighting fixtures (*ibid.*).

Appellant manufactures prismatic glassware for use with artificial lighting fixtures, and also assembles completed lighting fixtures containing such glassware (R. 57–58, 67). In the case of street lighting equipment, appellant manufactures and sells only the glass (R. 60, 68); in the case of institutional, industrial and commercial lighting equipment (the other three categories of products sold by appellant, R. 58, 70), appellant sells the assembled fixtures containing prismatic glass, and also sells the glass separately to manufacturers who incorporate it into a finished fixture (R. 68). In 1948, the year prior to the filing of the complaint, appellant's total sales of prismatic glassware and fixtures were $3,517,365.75, of which

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and reflects the light back past the source to the illuminated area (R. 67–68). Refractors are generally used for street lighting and outdoor fixtures; reflectors are used both indoors and outdoors, either in combination with refractors or separately (R. 68).

glassware sales constituted $2,091,962.61 and fixtures sales constituted $1,425,402.14 (Fdg. 7, R. 701).[5]

C. ORIGINS OF THE CONSPIRACY

The Holophane Glass Company of New Jersey was organized in 1898 by one Mygatt, an American who had become interested in a new type of prismatic glass globe developed by a French professor (R. 97–98). About 1912, Mygatt organized an English Company (the co-conspirator Limited), to which he turned over all the stock of the Holophane Glass Company (R. 98). Subsequently, Mygatt organized the co-conspirator Francaise (*ibid.*).

In 1925, Mygatt held the controlling stock in both Limited and Francaise. Limited in turn held all the stock of Holophane Glass Company (Fdg. 9, R. 702; R. 98). Each company was separately managed, and there was no evidence that Mygatt participated in the management of any of the companies (Fdg. 9, R. 702).

In that year, the management of Holophane Glass Company organized appellant's predecessor, and

[5] Appellant's salesmen are also engineers (R. 71, 101), and they render customers "an engineering service which is in effect a solution to their lighting problems" (R. 72). Appellant's vice-president in charge of sales described the company's "engineering organization" as its "principle business," and stated that its products were made as a "service" to that organization (R. 57). The district court, however, refused to amend the findings to add appellant's proposed finding (R. 711) that the "effective sale" of appellant's products "requires" engineering skill, and that 75% of its sales result from its engineering service (R. 717–718).

through it purchased the Holophane Glass Company from Limited for $1,000,000 (Fdg. 10, R. 702–703). The form of the transaction was that one Liberman, attorney for the Holophane Glass Company, obtained from Limited an option to purchase all of the Holophane Glass stock, which option he then assigned to appellant's predecessor (Fdg. 10, R. 702–703). After Holophane Glass Company was purchased from Limited, it was merged into appellant's predecessor (Fdg. 11, R. 703). The present appellant was organized in 1929 (*ibid.*). (Hereafter, "appellant" will be used interchangeably to designate either appellant or its predecessor, depending upon the year involved.)

1. *The Restrictive Trading Agreements*

When Liberman offered to transfer to appellant his option to purchase the stock of Holophane Glass Company, he stated that his purchase contract with Limited "calls for reciprocal trade and patents agreements between the English and American companies of great value," and that he was "also in a position to and does hereby offer you similar advantages with the French Company" (GX 2, R. 113, 114).[6] Such agreements were soon executed.

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[6] In 1921, Limited had granted an exclusive patent license agreement to Francaise to make and sell Holophane prismatic glassware under existing and future patents in Belgium, Spain, Portugal, Switzerland and Italy (Fdg. 8, R. 701–702; GX 7A, R. 145–152). The agreement also provided that each party would prevent the exportation of Holophane glassware to the territory of the other, and for mutual exchange of discoveries and improvements (*ibid.*). The license was for five years, and it has been renewed with basically the same provisions since that time (Fdg. 8, R. 702).

Immediately after the purchase of the stock of Holophane Glass Company, appellant entered into a "trading agreement" with Limited (Fdg. 12, R. 703; GX 1, R. 110; GX 4, R. 120). The agreement contained no termination date and was in effect at the time of the trial (Fdg. 12, R. 703). Its principal provisions were as follows:[7]

(1) The territory of appellant was defined as the part of the American continent north of the Panama Canal and adjacent islands (not including the West Indies), the Philippine Islands, Cuba and Japan. The territory of Limited was defined as the remainder of the world except France and its colonies.

(2) Appellant and Limited each agreed (*a*) not to carry on trade in the territory of the other except at the request of and for the benefit of the other; (*b*) to use every means in its power to prevent the exportation of products sold or manufactured by it from its territory into the territory of the other, except with the latter's written consent; (*c*) not to apply for or obtain patent or trade mark protection in the territory of the other, except at the request and for the benefit of the other party; (*d*) to communicate and assign every invention, design, discovery or improvement and trade mark to the other party, and to render any aid necessary to enable the other to secure proper protection in its territory; and (*e*) to supply the other party, when requested, with Holophane products at a price equal to factory cost plus 30%. Holophane products

[7] The agreement is GX 4, R. 120–133. The pertinent provisions are summarized in Fdgs. 12a–g, R. 703–704.

were defined as any products sold under the name "Holophane" and/or manufactured or sold by either company.

In June 1926 (approximately nine months after execution of the foregoing agreement), appellant entered into a trading agreement with Francaise which, "in all of its essential terms" was "identical" to the agreement with Limited (Fdg. 13, R. 704; GX 6, R. 135–144). This agreement, which was made effective as of September 15, 1925, was also of unlimited duration (Fdg. 13, R. 704).

Although the agreements cover the entire world, there were many countries in which none of the companies then carried on business; in other countries the companies made only occasional or isolated sales (Fdg. 15, R. 705). Even today, there are a number of countries covered by the agreements in which the companies have never made any substantial effort to develop a market (*ibid.*).[8] Moreover, there were many countries within the territories of appellant and Limited in which they had no patent or trade name or trade mark protection in 1925 and 1926 (*ibid.*).

The court found (Fdg. 19, R. 707) that appellant had failed to establish its contention that the agreements were "reasonable and necessary for the protection of the business and good will sold" in 1925 when appellant purchased Limited, or were "subordinate to the alleged lawful purpose" (Fdg. 19, R. 707). It further found (*ibid.*) that the agreements "were designed to eliminate competition between the parties

[8] Japan is such a country (R. 72).

and with outsiders in all markets of the world, and were neither measurable by, limited to, nor subordinate to the reasonable necessities of the sale."

2. *Modifications of the Trading Agreements*

The agreement between appellant and Limited was modified in 1944, when Limited sold to appellant "all of its rights to sell Holophane products in the South American territory," in return for $40,300 and an agreement for the mutual exchange of all research, technical, manufacturing and commercial information (Fdg. 16 (b), R. 705; GX 11, R. 176–181).[9] At the same time, the parties "also took this opportunity to reframe the definition of Holophane products to assure the application of the restraints to all products manufactured and sold by them, including products not subject to existing patents or trade marks, and products not marked 'Holophane'" (Fdg. 16 (b), R. 705–706; GX 12, R. 182–184). Although France at that time was occupied by Germany and the parties were uncertain as to the future of Francaise after the war, Limited agreed that any future trading agreement it might enter into with Francaise would prohibit the latter from exporting into the South American territory which appellant had acquired (Fdg. 16 (b), R. 706; GX 14, R. 187).[10]

[9] While Limited had "no real desire to sell" the South American rights, since it viewed that area "as being possibly the best potentiality of any of the export fields," it did so primarily "to cement the relations between the two Companies * * * and to ensure an interchange of information and data relating to the respective products" (GX 13, R. 185).

[10] In 1947, when Limited again granted a patent license to the reestablished Francaise, this commitment was fulfilled by a provi-

In 1945, appellant and Limited further modified the trading agreement by an inter-company buying agreement under which each party, at the request and for the benefit of the other, was permitted to ship to and invoice directly a customer located in the other's territory, and to render engineering service directly to such customer (Fdg. 16 (c), R. 706; GX 18–19, R. 201–203). It was further agreed that any direct inquiries or purchase orders received by either company from the territory of the other would be referred to the latter company for instructions (*ibid.*).

D. THE CONSPIRACY IN ACTION

Appellant, Limited and Francaise have "adhered to and enforced" the foregoing restrictive agreements (Fdg. 17, R. 706). "In fulfillment of its obligations" thereunder, appellant has imposed upon its customers and dealers "contractual obligations not to export products purchased from it into the territory of 'Limited' and 'Francaise.'" It has been appellant's practice to reject orders and requests for quotations from its customers whenever it suspects that the order is to be shipped into the territory of Limited and Francaise, and to refer such customers to one of those companies (Fdg. 18, R. 706–707).[11]

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sion in the license that neither Limited nor Francaise would permit the exportation of its products into appellant's territory, which was defined to include South America (Fdg. 16 (b), R. 706; GX 17, par. 11, R. 193, 197).

[11] Appellant has admitted that it attempts to prevent its customers from shipping its products into those territories. Thus, when Francaise insinuated that appellant had "indirectly or directly encouraged" an American company to ship Holophane

The record shows numerous instances in which appellant referred inquiries as to orders (GX 42, R. 338; GX 43, R. 339; GX 48, R. 343) and requests for literature (GX 52–65, R. 346–358) relating to the territories of Limited and Francaise to those companies. For example, when appellant received an inquiry in 1948 from the International General Electric Company "for permission to supply a quantity of No. 4110 refractors to them for sale in fixtures that they will ship to Lebanon," it "informed them that we cannot sell them these refractors but suggested that they obtain quotations" from Limited (GX 35, R. 318). Appellant then requested Limited to quote General Electric, advising what it would charge Limited for the item (*ibid.*). Similarly, in 1951 appellant referred to Limited a request from General Electric for information with respect to lighting fixtures for installation in Oslo (GX 47, R. 342). When the supervising engineer for a project in India insisted on using appellant's product, appellant re-

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products to "countries which are outside of our regular territory such as Belgium," appellant vigorously denied it, stating: "That is not the way we do business and I would like to have this clearly understood once and for all * * * we advise them [American customers], whenever we have the slightest suspicion about destination to outside countries not under our jurisdiction, they must get in touch with the respective foreign Holophane Company. That we will continue to do" (GX 78, R. 374, 375). Cf. GX 81, R. 379.

As of November 10, 1951, appellant had agreements with approximately 60 distributors under which export of Holophane lenses is prohibited (Requests for admissions Nos. 91–93, R. 28–29, not denied, R. 38–40; GX 37–39, R. 319–331. See GX 40–41, R. 332–338).

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quested, and received (GX 50, R. 345), Limited's "permission to accept an order" for the material (GX 49, R. 344; see GX 51, R. 346).[12]

Conversely, appellant refused to permit Limited and Francaise to ship into its territory (GX 42–43, R. 338–339). Indeed, on one occasion appellant refused to authorize Limited to quote directly and pay it a 5% commission on a South American order which Limited stated "must be placed" in England (GX 67, R. 359), on the ground that appellant felt that "even at the risk of losing some business, we should keep the American Continent market for Holophane absolutely to ourselves" (GX 68, R. 360, 361).

A further example of the restrictive effect of the conspiracy was the unsuccessful attempt of the Line Material Company to obtain Holophane refractors for street lighting equipment to be shipped to Belgium, Holland and Luxembourg. Initially, appellant declined to quote prices on this equipment, and referred Line Material to Francaise (GX 83–84, R. 382–383). The latter offered to fill the order for Belgium and Luxembourg, but explained that, since Holland was within the territory of Limited, Line Material would

[12] In 1949, appellant's vice-president in charge of sales, because he was "not sure that we are dealing with foreign inquiries and orders correctly," requested instructions from appellant's president on the procedure to be followed in various hypothetical situations involving the territory of Limited and Francaise (GX 32, R. 315). The answer was that in each situation appellant would not answer the inquiry or accept the order, but would refer it to the company whose territory was involved (GX 33–34, R. 317; R. 62–66, 72–74). Although GX 32 contains the handwritten answers to the questions, the printed record does not show them.

have to deal directly with the latter on the Dutch portion of the business (GX 84, R. 384–385). After further negotiations, Line Material advised appellant that "it would be impossible for us to do business on this basis" (GX 84, R. 383), and requested appellant's president to use his "good offices" to make some arrangement by which Line Material could purchase refractors directly from appellant "even if we would have to place the order for these refractors officially with London or Paris" (*id.*, R. 385). Appellant worked out an arrangement by which it would supply the refractors and would pay a commission thereon to Limited and Francaise (GX 89, R. 392), but at the last minute the deal fell through when Francaise demanded a 5% sales commission for its Belgium subsidiary not only on the refractors but on the entire street lighting fixtures (GX 91, R. 393; GX 94, R. 396)—a demand which Line Material rejected as "arbitrary, unfair and unacceptable" (GX 95, R. 397).

E. THE JUDGMENT

The judgment of the court, among other things, adjudicates that appellant has violated Section 1 of the Sherman Act (Paragraph IV, R. 694); cancels the restrictive agreements and enjoins appellant from "further performance or enforcement" thereof (Paragraph V, R. 695) or from entering into, performing or claiming any rights under any similar agreements or understandings (Paragraphs VI and VII, R. 695–696); prohibits various restrictive practices relating to patents, trade marks, or trade names (Paragraph

VIII, R. 696); and enjoins appellant from referring any order, inquiry or request for literature to Limited and Francaise (Paragraph IX, R. 696–697).

The judgment also requires appellant to take certain affirmative action designed to restore competition. Paragraph X (R. 697–698) directs appellant (A) to terminate its contractual provisions prohibiting customers or distributors from reselling its products in a foreign country; (B) to advise its customers and distributors that it does not restrict the exportation of its products; and (C) to send a copy of the judgment to Limited and Francaise and inform them that they are no longer obligated not to export to appellant's territory.

Paragraph XI—the principal subject of controversy on this appeal—provides as follows (R. 698–699, 715–716): [13]

> Defendant is ordered and directed:
>
> A. To use reasonable efforts, including but not limited to the use of present or subsequent distributors or wholly-owned subsidiaries, to promote the sale and distribution of said products in foreign markets, including the territories of "Limited" and "Francaise." Nothing contained in this paragraph shall be construed as requiring the exportation by the defendant of any such products in violation of the valid patent or trade-mark or trade-name rights of any person in any foreign country. If, because of such valid patent or trade-mark

[13] Paragraph XI A was amended in accordance with the stipulation at R. 715–716.

or trade-name rights, such exportation can be made into certain countries only by means of unmarked glass or the adoption of another trade-mark or trade-name for such exportation, then the defendant shall, within one year from the date hereof, have available sufficient quantities of unmarked glass or glass marked with a new trade-mark to be distributed under a new trade-name, if necessary, to meet reasonable anticipated foreign demand.

B. To offer said products for sale and export to the territories of "Limited" and "Francaise" at prices and upon terms and conditions of sale not discriminatory as compared to those offered to purchasers for use or resale in the United States.

C. To take the following specific steps to promote and develop export sales of said products:

(1) To circularize within one year from the date of this Judgment known potential distributors of said products in the territory of "Limited" and "Francaise," seeking to employ their services in selling and distributing said products.

(2) Beginning six months from the date of this Judgment and for a period of five years thereafter, to insert advertisements at reasonable intervals in trade journals of appropriate circulation in all countries in which said products manufactured by "Limited" or "Francaise" are sold in substantial quantities, of the manufacture and availability for sale of said products.

(3) To circularize within one year from the date of this Judgment all persons who from

January 1, 1948 to date of this Judgment have made written inquiry to the defendant respecting the purchase or distribution of said products, exported to any country in the territory of "Limited" or "Francaise" informing them of the manufacture and availability for sale of said products.

(4) To respond in writing to all persons who from the date of Judgment make written inquiry to the defendant respecting the purchase or distribution of said products for export to the territory of "Limited" or "Francaise," advising them of the manufacture and availability for sale of said products.

D. To file a report with the Clerk of this Court each year for a period of five years from the date of this Judgment, showing action taken in compliance with the terms of this Paragraph XI.

SUMMARY OF ARGUMENT

I

A. In the court below, appellant filed proposed findings and conclusions and a proposed decree in which it conceded that the agreements for division of markets among itself, Limited and Francaise are illegal. It confirmed the concession during hearings on the proposed findings, conclusions and decree. Having thus conceded the illegality of the agreements, appellant is in no position to challenge the holding of violation of the Sherman Act. *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, 295; *United States* v. *Babbitt*, 104 U. S. 767, 768.

B. In any event, the agreements plainly violate the law. This Court consistently has held that agreements to allocate or divide markets are illegal *per se*. *E. g., Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596–99; *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y.), affirmed, 332 U. S. 319. The rule of *per se* illegality is not limited, as appellant contends, to agreements for division of domestic markets, but is equally applicable to those for division of foreign areas.

Appellant can obtain no comfort from the common law doctrine of ancillary restraints. Under that doctrine, a covenant not to compete executed upon the sale of a business can be no greater than is reasonably necessary to prevent the seller from re-entering the same business and thus partially destroying the good will sold. The restraint must be reasonable both in its duration and in its territorial scope. A division of world markets among three companies cannot be deemed reasonably necessary to the protection of the sale of part of the business of one company to the other. Furthermore, the agreements were of indefinite duration and were still operative at the time of the trial, more than a quarter of a century after their execution.

The restrictive agreements are not saved from illegality because the conspirators allegedly do not dominate the market for prismatic glassware. Unreasonable restraints on foreign commerce are illegal "regardless of the amount of commerce affected * * *. Hence it is enough if some appreciable part of inter-

state [foreign] commerce is the subject of a monopoly, a restraint or a conspiracy." *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225. Appellant's annual total sales of prismatic glassware and fixtures of $3,500,000 plainly constituted an "appreciable part" of commerce.

II

The principal issue on this appeal is the validity of Paragraph XI of the judgment, which directs appellant "to use reasonable efforts * * * to promote the sale and distribution of said [Holophane] products in foreign markets, including the territories of 'Limited' and 'Francaise'," and to take certain designated "specific steps to promote and develop export sales of said products." Appellant contends that this provision is beyond the power of the district court because it represents an attempt to give the Sherman Act extraterritorial effect and because it impinges on the sovereignty of foreign nations. Appellant further argues that if the court had the power to enter such a provision, it abused its discretion by doing so in this case. We submit, however, that Paragraph XI poses no real threat of conflict between American and foreign countries, and that it represents a proper exercise of the district court's broad "discretion * * * to make the remedy [in an antitrust case] as effective as possible." *United States* v. *National Lead Co.*, 332 U. S. 319, 334.

A. The fact that the restrictive agreements (which are illegal under the Sherman Act) may still be legal abroad does not mean that an American court cannot

direct an American corporate defendant which is properly before it in a Sherman Act proceeding to take reasonable steps to develop the sale of its products in territories formerly allocated to its coconspirators. This Court repeatedly has recognized the power of a court of equity to require a defendant to take action beyond its jurisdictional boundaries, and an American court similarly can direct the performance of acts outside the United States when there has been no showing that such acts would affirmatively violate any foreign statute, ordinance or regulation, or the valid judgment of any foreign court. See *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 289. We construe the provision in the judgment directing appellant to use "reasonable efforts" to sell its products in foreign markets as requiring only efforts that would not involve such a violation.

Appellant's contention that the judgment violates the sovereignty of foreign nations rests on the assumption that the restrictive agreements, which are illegal *per se* under American law, are nevertheless valid under foreign law. But "foreign law is to be proved as a fact" (*Black Diamond Steamship Corp.* v. *Stewart & Sons,* 336 U. S. 386, 397), and since appellant did not prove the foreign law at the trial, this Court should not speculate as to what it may be. The British cases cited by appellant do not establish that a British court would view the agreements differently than the American court did. And whatever may be the situation under British law, it cannot be presumed that the agreements are valid

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under the laws of France or of the numerous other countries in the territories of Limited and Francaise in which appellant refused to do business.

But even assuming that the agreements are legal in the territories of Limited and Francaise, it does not follow that there would be any conflict between American and foreign courts if appellant attempts to sell its products in those countries. Limited and Francaise may respond by invading the American market instead of instituting legal proceedings against appellant. Or, if they should institute litigation, the foreign court nevertheless may decide, as a matter of comity, to give effect to the American court's adjudication of illegality.

In sum, the alleged threat of conflict between American and foreign courts is wholly conjectural at this time and it affords no basis for modification of the judgment. See *International Salt Co.* v. *United States,* 332 U. S. 392, 401–402, where this Court declined to modify an antitrust judgment on the basis of conjectural claims of future injury.

The *British Nylon Spinners* case, upon which appellant relies to support its contention that Paragraph XI impinges on the sovereignty of foreign countries, actually suports our contention that the judgment below poses no real threat of conflict between American and foreign courts. There, an American antitrust judgment had directed ICI, a British corporate defendant, to reassign certain English patents which ICI had already agreed to sublicense to another British company. In a subsequent suit in England by

the prospective sublicensee to enjoin ICI from reassigning the patents and for specific performance of the sublicensing agreement, the British court refused to accept the American judgment as a defense. The court held that since the American judgment did not require ICI to perform any act which a British court subsequently might prohibit, the latter's refusal to accept the American judgment would not create "any difficulty in regard to comity between the courts of the two countries." *British Nylon Spinners* v. *Imperial Chemical Industries,* L. R. [1955] 1 Ch. 37, 53. Since the judgment in the instant case similarly does not require appellant to perform any acts abroad which a foreign court subsequently may prohibit, there is likewise no possibility of any conflict between American and foreign sovereignty in this case. Furthermore, since the judgment in the instant case does not terminate vested property rights, but only cancels executory agreements not to compete, a British court might well accept it as a defense in a suit by Limited to enjoin appellant from breaching the agreements.

B. In the light of the findings and record in this case, we submit that the district court did not abuse its broad "discretion * * * to make the remedy [in an antitrust case] as effective as possible" (*United States* v. *National Lead Co.,* 332 U. S. 319, 334) by directing appellant to "use reasonable efforts" to promote the sale and distribution of its products in foreign markets. For thirty years appellant and its coconspirators have maintained an ironclad division of world markets and have scrupulously refrained from

any action which might disturb such allocation. Under these circumstances, the district court properly concluded that a judgment which merely cancelled the restrictive agreements and enjoined their enforcement would not be adequate to "effectively pry open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States,* 332 U. S. 392, 401. For under such a judgment, it is likely that the *status quo* would have been continued. "The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do." *International Salt* case, *supra,* p. 400. Paragraph XI was designed both to stimulate American export trade in Holophane products, and to induce the co-conspirators to enter the American markets and thus develop American import trade and introduce into the American domestic market competition in the sale of Holophane products.

Requiring appellant to use reasonable efforts to sell its products abroad does not subject it to a "penalty." The record shows that appellant has stayed out of foreign markets because the illegal agreements obliged it to do so, and not because of any unwillingness to accept such business. Appellant has shown no reluctance to do business in the territories of Limited and Francaise when the latter did not object. The record does not support appellant's assertions that effective selling in foreign areas would necessarily entail "great expense."

The fact that cartels might be effectively regulated through international agreement does not limit the right, indeed the duty, of the district court to take all necessary steps to eliminate restraints on American foreign trade. Any such limitation on the function of the district court as appellant suggests is properly within the province of Congress and not of this Court.

ARGUMENT

I

APPELLANT'S AGREEMENTS WITH LIMITED AND FRANCAISE FOR THE DIVISION OF WORLD MARKETS AND THE ELIMINATION OF COMPETITION VIOLATED SECTION 1 OF THE SHERMAN ACT

A. APPELLANT CONCEDED IN THE COURT BELOW THE ISSUE OF VIOLATION IT NOW SEEKS TO RAISE

In the court below, appellant conceded the illegality of its agreements with Limited and Francaise for division of world markets. This concession was made under the following circumstances:

At the end of the trial, the court directed both sides to file proposed findings of fact and conclusions of law and a proposed judgment (R. 107–109). After the Government had filed its proposals (R. 621–637), but *before* the court had decided the case, appellant filed its proposed findings, conclusions and decree, including the following proposed conclusion of law (R. 648):

> 3. Despite the lack of proof as to the present ownership of the Mygatt interests in defendant, Limited and Francaise, under the decision in

> *United States* v. *Timken Roller Bearing Company,* the agreements between defendant, Limited and Francaise now are unlawful and constitute a combination and conspiracy in restraint of trade and commerce in prismatic glassware and illuminating appliances containing prismatic glassware among the several states of the United States and with foreign nations, all in violation of Section 1 of the Sherman Act.

Paragraph IV of appellant's proposed final judgment (R. 650–651), filed at the same time, "declared and adjudged" that the agreements were "illegal and in violation of Section 1 of the Sherman Act."

This concession of invalidity was made in formal pleadings filed more than six months after the trial had been completed.[14] It obviously represented appellant's considered judgment as to what position it should take with respect to the issue, and as such must be deemed binding upon it.

Furthermore, appellant confirmed the concession during the subsequent hearings on the proposed findings, conclusions and decree. At that hearing, held more than three months after appellant had filed its proposals, but at a time when the court still had not adjudicated the legality of the agreements, the court inquired: "Now, I understand the defendant admits the illegality of the agreements in question and its proposed decree so states * * *" (R. 663). Appellant's counsel replied: "I think your summation is correct"

[14] The trial ended June 4, 1952 (R. 86). Appellant's proposed findings, conclusions and judgment were filed January 22, 1953 (R. 638).

(R. 664). Appellant's counsel also stated to the court that "in the form of a decree we have submitted to Your Honor that we have acknowledged the illegality of these contracts for the purpose of this litigation" (R. 666; see R. 689 for a similar concession).

Having thus conceded that the agreements are illegal, appellant is in no position to assert their validity before this Court. *Pacific Railroad* v. *Ketchum,* 101 U. S. 289, 295; *United States* v. *Babbitt,* 104 U. S. 767, 768; cf. *United States* v. *Hancock Truck Lines,* 324 U. S. 774, 779–780.

B. BY ANY TEST, THE AGREEMENTS ARE PLAINLY ILLEGAL.

Appellant contends (Br. 24–26) that since the agreements related to foreign rather than to domestic commerce, they cannot be deemed illegal *per se;* and that when tested by the rule of reason they are reasonable restraints of trade, because (1) they were "properly ancillary to the sale of a unit by the original owner of the world-wide Holophane enterprise" (Br. 30), and (2) the "facts show that appellant lacked the size, financial or business capacity, and market position to cause any significant or substantial restraint upon competition in foreign trade and commerce in prismatic glassware" (Br. 34). Assuming that appellant may now properly raise these contentions, we submit that they are plainly without substance.

1. This Court consistently has held that agreements to allocate or divide markets are illegal *per se. Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 596–99; *United States* v. *National Lead Co.,* 63 F. Supp. 513 (S. D. N. Y.), affirmed, 332 U. S. 319; *Apex*

Hosiery Co. v. *Leader*, 310 U. S. 469, 497; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 182; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241. See also *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 439–445, 447–448 (C. A. 2); *United States* v. *Bayer Company*, 135 F. Supp. 65 (S. D. N. Y.). The rule of *per se* illegality is not limited, as appellant contends (Br. 24–26), to agreements for division of domestic markets, but is equally applicable to those for division of foreign areas. Five of the foregoing cases in which agreements for division of territories were held *per se* illegal involved foreign trade (*Timken, National Lead, American Tobacco, Aluminum* and *Bayer*).

The court's findings (which appellant does not attack) and the supporting evidence (see Statement, *supra*, pp. 12–15) show that for more than a quarter of a century appellant and its co-conspirators have been parties to and carried out agreements under which they divided world markets and eliminated all competition among themselves. Appellant not only has kept out of the territory of the co-conspirators (except upon their specific authorization, and for their benefit), but has refused to sell its trademarked products in this country when it knew or suspected that ultimately they were destined for a co-conspirator's market area. As the district court correctly concluded, the agreements "were designed to eliminate competition between the parties and with outsiders in all markets of the world" (Fdg. 19, R. 707). The court's findings and the supporting evidence conclusively es-

tablish, we believe, that the agreements had precisely that effect. They plainly are illegal *per se*.

2. Even if this Court's decisions did not make plain, as they do, that agreements of the character here involved are conclusively presumed illegal,[15] appellant's effort to draw comfort from the common law doctrine of ancillary restraints would necessarily fail. Under that doctrine, a covenant in partial restraint of trade ancillary to a contract's main lawful purpose is lawful, but if the restraint "exceeds the necessity presented by the main purpose of the contract, it is void * * *." *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (C. A. 6), affirmed, 175 U. S. 211.[16] Thus, on the sale of a business, any restraint on competition may be no greater than that reasonably necessary to prevent the seller from re-entering the same business and thus partially destroying the value of what he had sold. This meant, as the cases show, that the restraint must be limited both in its duration and in its territorial scope. *Id.*, pp. 278–294.

Appellant's agreements with Limited and Francaise did not begin to satisfy these requirements. The agreement with Limited was not restricted to protecting the latter in the areas where it previously had done

[15] In *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 597–598, the Court held that since cartel agreements for the division of world markets similar to those here involved "are illegal under the [Sherman] Act," it was immaterial whether they were merely incidental to an otherwise legitimate joint venture.

[16] The *Addyston* opinion of Chief Justice (then Circuit Judge) Taft contains the leading discussion of the doctrine of ancillary restraints.

business. Instead, it divided up the markets of the entire world, including areas where neither party had ever done business.[17] Furthermore, nine months after its execution, appellant entered into a similar restrictive agreement with Francaise, a company which was not shown to have participated in any way in the sale between Limited and appellant.

Territorial restrictions dividing the world among three companies can scarcely be justified as a partial and ancillary restraint reasonably necessary to the protection of the sale of part of the business of one company to the other.[18] Furthermore, the agreements went beyond the covenants not to compete and included other restrictive provisions "used by the conspirators to achieve their unlawful purpose" "to divide world territories."[19] *United States* v. *Imperial*

[17] Moreover, almost 20 years later, when appellant purchased from Limited the naked right to sell in South America, the covenants were extended to protect appellant from competition in that area.

[18] Appellant's statement (Br. 17) that "if Holophane Company, Inc., was to be born as an independent American Company, it was compelled to subscribe to territorial and related restrictions with Limited and Francaise," has no support in the record. Exhibit A–37, upon which appellant relies (Br. 27–28), was never offered or admitted in evidence. See note 3, *supra*.

[19] The agreements, as modified, included provisions for mutual exchange of discoveries, trade marks and all research and technical information (cf. *United States* v. *National Lead Co.*, 63 F. Supp. 513, 532 (S. D. N. Y.), affirmed, 332 U. S. 319, 328; *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (N. D. Ohio), affirmed, 341 U. S. 593); and a prohibition on any party's obtaining patent or trade mark protection in the territory of any other party. Further, appellant construed the undertaking to prevent exportation of Holophane products into the other parties' territories as requiring it to prevent its American customers from ship-

Chemical Industries, 105 F. Supp. 215, 220, 221 (S. D. N. Y.). Finally, the covenants not to compete were of indefinite duration and were still operative at the time of the trial, a quarter of a century later.

The district court thus correctly found (Fdg. 19, R. 707) that the agreements were not "subordinate to the alleged lawful purpose" of protecting "the business and good will sold," but on the contrary "were designed to eliminate competition between the parties and with outsiders in all markets of the world, and were neither measurable by, limited to, nor subordinate to the reasonable necessities of the sale."[20]

3. Nor can the agreements be upheld because the conspirators allegedly do not dominate the market for prismatic glassware. "Section 1 of the Act outlaws unreasonable restraints on interstate [foreign] commerce, regardless of the amount of the commerce affected. * * * Hence it is enough if some appreciable part of interstate [foreign] commerce is the subject of a monopoly, a restraint or a conspiracy."

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ping its products into those territories—a practice which contravened the settled rule prohibiting a patentee from controlling a patented article once it has been sold (*United States v. Univis Lens Co.*, 316 U. S. 241, and cases cited at p. 250).

[20] The fact that prior to the conspiracy all the parties were under common control does not legalize the restrictive agreements. "The test of illegality under the Act is the presence or absence of an unreasonable restraint on interestate [foreign] commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227. See also, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 597–598.

United States v. *Yellow Cab Co.*, 332 U. S. 218, 225; see *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, note 59; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485. In the year prior to the filing of the complaint, appellant's total sales of prismatic glassware and fixtures were $3,500,000 (Fdg. 7, R. 701). This plainly constituted an "appreciable part" of commerce.

While it is true that in the cartel cases cited by appellant (Br. 31–32) the conspirators had a dominant market position, that was not the basis for holding the division of markets *per se* legal. "[I]t is the nature of the restraint and its effect on interstate [foreign] commerce and not the amount of the commerce which are the tests of violation" (*Apex Hosiery* case, *supra*). Cf. *International Salt Co.* v. *United States*, 332 U. S. 392, where tying agreements covering annual salt sales of $500,000 were condemned as illegal *per se* because they foreclosed competitors from a "substantial market" (p. 396).

II

THE RELIEF ORDERED BY THE DISTRICT COURT IS PROPER

The judgment in this case contains numerous provisions which are familiar in antitrust cases.[21] Thus, the judgment cancels the restrictive agreements, enjoins their performance or the execution or carrying out of any similar agreements, and prohibits various restrictive practices relating to patents, trade marks

[21] With one exception (see *infra*, p. 34, note 23), appellant does not challenge these provisions.

or trade names. In addition, it directs appellant to take various affirmative steps designed to restore competition. Paragraph XI, which is the principal focus of attack on this appeal, directs appellant "[t]o use reasonable efforts * * * to promote the sale and distribution of said [Holophane] products in foreign markets, including the territories of 'Limited' and 'Francaise'," and to take certain designated "specific steps to promote and develop export sales of said products." [22]

Appellant contends that the provisions in paragraph XI directing it "to perform affirmative acts abroad" (Br. 58) are beyond the power of the district court because they violate the "law of nations in two signal respects": (1) they "deprive Limited and Francaise of valuable rights under their contracts with appellant when neither Limited nor Francaise was before the Court" (Br. 41); and (2) they constitute "an attempt by the District Court to thrust the economic concepts

[22] The "specific steps" are as follows: (1) circularization of "known potential distributors" of Holophane products within the territory of Limited and Francaise "seeking to employ their services in selling and distributing said products"; (2) inserting advertisements in trade journals in all countries in which Holophane products manufactured by Limited and Francaise "are sold in substantial quantities"; (3) circularizing all persons who since January 1, 1948 have made written inquiry to appellant respecting the purchase or distribution of Holophane products, exported to the territory of Limited and Francaise, informing them of the availability of such products; (4) advising all persons in writing who make written inquiry to appellant respecting the availability of said products for export to those territories that such products are available (R. 698–699).

of the antitrust laws upon markets and territories outside the United States * * * where our statutes are not operative and in which the public policy of the sovereign is not in accord with our notions of free competition" (Br. 42).[23] Appellant further contends (Br. 52–57) that even if the district court had power to order it to compete abroad, the court nevertheless

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[23] Although appellant's proposed final judgment provided for cancellation of the illegal agreements (Par. IV, R. 650–651; see R. 666, 689), appellant now attacks paragraph V of the judgment insofar as it "cancel[s] rather than enjoin[s] compliance with" the agreements (Br. 58), apparently on the ground that it "deprive[s] Limited and Francaise of valuable rights under their contracts with appellant when neither Limited nor Francaise was before the Court." Assuming that appellant can now raise this issue (see *supra*, pp. 25–27), the short answer to the contention is that paragraph V merely cancels the agreements insofar as appellant is concerned, and does not purport to terminate them under the laws of other countries insofar as Limited and Francaise are concerned.

In *United States* v. *National Lead Company*, 332 U. S. 319, the district court found that agreements for division of world markets similar to those in the instant case were illegal *per se* and its judgment, *inter alia*, cancelled the agreements (p. 330, footnote). There, as here, many of the co-conspirators who were parties to the agreements thus cancelled were not before the court. This Court upheld the decree as entered, including the provision for cancellation of the illegal agreements, on the ground that the "District Court has not exceeded its discretion in the provisions of this decree but has employed its discretion with commendable fairness having especial regard to the needs of this case" (p. 335). See, also, *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 601, where this Court affirmed paragraph IV (A) of the judgment, which "terminated" the illegal agreements for division of markets between Timken and its French and British subsidiaries, neither of which was before the district court. Record on appeal, No. 352, October Term, 1950, pp. 1174–75.

abused its discretion in exercising the power in this case. The argument as to discretion rests in large part on the same ground as the argument as to power, namely, that the district court, by directing appellant to use reasonable efforts to promote the sale and distribution of its products abroad, has attempted to give American law extraterritorial effect, and that its judgment therefore impinges on the sovereignty of foreign nations. As we shall show, this basic premise is erroneous, and paragraph XI poses no real threat of conflict between American and foreign courts. We shall further show that the judgment represents a proper exercise of the district court's broad "discretion * * * to make the remedy [in an antitrust case] as effective as possible." *United States* v. *National Lead Co.*, 332 U. S. 319, 334.

A. THE DISTRICT COURT HAD POWER TO DIRECT APPELLANT TO USE REASONABLE EFFORTS TO SELL ITS PRODUCTS IN FOREIGN COUNTRIES

Appellant correctly states the general proposition that, consistent with international law, the courts of one country cannot exercise their power in the territory of another (Br. 31–34).[24] But it does not follow

[24] Appellant relies (Br. 39–40) upon *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, to support its further contention that "our antitrust laws do not apply to acts wholly outside this country even by American companies" (Br. 44). However, as this Court recently has pointed out (*Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 288), the reason that the acts involved in the *American Banana* case were held not to constitute a violation of the Sherman Act was not that they had occurred outside the United States, but because they were the acts of a foreign government and that "a violation of American

from this general proposition that an American court cannot direct an American corporate defendant in a Sherman Act proceeding to use reasonable efforts to sell its products in foreign countries merely because the contracts which were held illegal under the Sherman Act may nevertheless be valid under foreign law. This Court repeatedly has recognized the power of a court of equity to require a defendant properly before it to take action beyond its jurisdictional boundaries. *E. g., Massie* v. *Watts,* 6 Cranch 148; *Pennoyer* v. *Neff,* 95 U. S. 714, 723; *Phelps* v. *McDonald,* 99 U. S. 298, 308; *New Jersey* v. *New York City,* 283 U. S. 473, 482. We submit that an American court similarly can direct the performance of acts outside the United States where there has been no showing that such acts would violate any foreign statute, ordinance or regulation, or the valid judgment of any foreign court. Appellant is an American corporation, properly before the district court, and "[w]here, as here, there can be no interference with the sovereignty of another nation [in the foregoing sense], the District Court in exercising its equity powers may command persons properly before it to cease or perform

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laws could not be grounded on a foreign nation's sovereign acts." Where no act of a foreign sovereign was involved, this Court repeatedly has held that acts committed outside the United States which affect American foreign or domestic commerce may violate the Sherman Act. *United States* v. *Pacific and Arctic Co.*, 228 U. S. 87; *Thomsen* v. *Cayser*, 243 U. S. 66; *United States* v. *Sisal Sales Corporation*, 274 U. S. 268; see also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 442–445 (C. A. 2). In any event, the finding of violation in this case rests in large measure on acts performed in the United States (see Statement, *supra*, pp. 12–15).

acts outside its territorial jurisdiction." *Steele* v. *Bulova Watch Co.,* 344 U. S. 280, 289.

Appellant's argument that the judgment violates the sovereignty of foreign countries rests on its *a priori* assumption that the restrictive agreements, which are illegal *per se* under American law (see *supra,* pp. 27–29), are plainly valid under foreign law. But "foreign law is to be proved as a fact." *Black Diamond Steamship Corp.* v. *Stewart & Sons,* 336 U. S. 386, 397, and cases there cited; see *Ennis* v. *Smith,* 14 How. 400, 426–427. Appellant made no attempt at the trial to prove the foreign law,[25] and this Court should not be required to speculate as to what it may be.

The British cases cited by appellant (Br. 42–44) do not establish that a British court necessarily would view these agreements for division of world markets differently than the American court did.[26] Further-

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[25] In recent cartel cases, the defense has presented expert witnesses who testified as to foreign law. *E. g., Timken Roller Bearing Company* v. *United States,* 341 U. S. 593, Record on Appeal, No. 352, October Term, 1950, pp. 603–635; *United States* v. *Imperial Chemical Industries,* 105 F. Supp. 215, 228 (S. D. N. Y.).

[26] Appellant's discussion of British law ignores the fundamental distinction which the British courts draw between the enforceability of contracts in restraint of trade, and the tort liability of persons engaging in restrictive trade practices. Thus, a contract in restraint of trade may be unenforceable because unreasonable even though its performance is neither tortious nor criminal. *Joseph Evans & Co., Ltd.* v. *Heathcote,* [1918] 1 K. B. 418, 426 (C. A.); *Mogul Steamship Co., Ltd.* v. *McGregor, Gow & Co.* [1892] A. C. 25, 39 (H. L. 1891); *Hilton* v. *Eckersley,* 6 E & B. 47, 119 Eng. Rep. 781 (1855). The *Mogul* and *Sorrell* cases which appellant cites merely apply the settled principle that one who

more, whatever may be the situation under British law, there is no basis at all for appellant's assumption (Br. 44) that the agreements are legal under French law. Finally, we urge that this Court cannot indulge

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has been damaged by restrictive trade practices carried out through combinations and agreements entered into for bona fide business purposes cannot recover in tort; they do not deal with the enforceability of the restrictive agreements themselves.

Under English law, a contract in restraint of trade is valid if, but only if, it is reasonable (1) as between the parties to the contract and (2) as to the public. *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A. C. 535, 565 (H. L.); *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.*, [1914] A. C. 461, 470–71 (H. L.); *Attorney-General of Australia* v. *Adelaide Steamship Co., Ltd.*, [1913] A. C. 781, 795 (P. C.) If the contract is not illegal on its face, it will be upheld if, in view of all the circumstances, it appears to be "just and honest" (*Mitchel* v. *Reynolds*, 1 P. Wms. 181, 196 (K. B. 1711)), and does not exceed "what is reasonably necessary to give effect to the lawful object in view * * *" *Palmolive Co. (of England), Ltd.* v. *Freedman*, [1928] Ch. Div., 264, 282 (C. A. 1927). Thus, it is basically a question of public policy. *Palmolive* case, *supra; Attorney General of Australia* v. *Adelaide Steamship Co., Ltd.*, *supra* at 797; cf. *Vancouver Malt and Sake Brewing Co.* v. *Vancouver Breweries Ltd.*, [1934] A. C. 181, 189 (P. C.). And since "each case must necessarily depend upon its own special facts," precedent is "not much guidance," *Palmolive Co. (of England), Ltd.* v. *Freedman*, *supra* at 280.

The English courts have not hesitated to hold contracts in restraint of trade to be unreasonable and hence void and unenforceable. *E. g.*, *Vancouver* case, *supra; McEllistrim* v. *Ballymacelligott Cooperative Society* [1919] A. C. 548; *Tipperary Creamery Society* v. *Hanley*, 2 Irish Rep. 586 (1912); *Joseph Evans & Co., Ltd.* v. *Heathcote* [1918] 1 K. B. 418 (C. A.); *Urmston* v. *Whitelegg Brothers*, 63 L. T. (N. S.) 455 (Q. B. 1890); *Hilton* v. *Eckersley*, 6 E. & B. 47, 119 Eng. Rep. 781 (1855).

Recent English legislation apparently has been designed to secure greater competition. Thus, the Monopolies Act of 1948 establishes a permanent commission to enquire into business prac-

in speculation as to the validity of the agreements under the laws of Norway, Sweden, India, Lebanon, Israel and the numerous other countries in the territories of Limited and Francaise in which appellant refused to do business because of the restrictive agreements.[27]

But even assuming that the agreements are legal in the territories of Limited and Francaise, it does not follow that there will be any conflict between American and foreign courts if appellant is required to promote the sale of its products in those countries. There has been no showing, or attempt to show, that breach of an agreement for division of markets violates any statute, ordinance or regulation of those countries, or would subject appellant to any Governmental penalty or forfeiture. Indeed, the restrictive agree-

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tices. "In general, but subject to important qualifications, it [the Commission] has taken the view that more competitive conditions in industry and trade serve the public interest better than less competitive conditions. The Commission has tended to equate the interests of consumers with the public interest." Friedmann, *Antitrust Laws* (1956), p. 379. It has therefore examined and condemned various market sharing schemes. *Id.* at 380–81.

[27] The record shows that appellant refused to fill orders, quote prices or fill requests for literature with respect to the following countries:

Lebanon	R. 318
Norway	R. 342, 353
India	R. 357
New Zealand	R. 343
Italy	R. 348
Germany	R. 349
Israel	R. 349
Australia	R. 350, 355
New Zealand	R. 351
Sweden	R. 354
Belgium	R. 354

ments themselves provide no penalties for breach (R. 120–144, 176–184, 201–203). Moreover, if appellant begins to do business in the territories of its co-conspirators, the latter may decide to invade the American market (cf. *Foundry Services* v. *Beneflux Corp.*, 110 F. Supp. 857 (S. D. N. Y.), reversed, 206 F. 2d 214 (C. A. 2)) instead of instituting legal proceedings against appellant.[28]

Moreover, if Limited or Francaise should attempt to prevent appellant from doing business in their territories on the ground that the restrictive agreements are still legal there, a court sitting in such territory might decide, as a matter of comity, to give effect to the American court's adjudication of illegality, and refuse to enforce the agreements. But that decision would result not because the American court had attempted to extend its jurisdiction over the foreign

[28] Appellant states (Br. 53) that if it sells in England the "imminence of litigation in the British courts * * * is plain," and that "[l]itigation by Francaise is equally inevitable." These statements are based on a letter from Limited to appellant contending that the agreements are still valid in England (R. 680–681), a cablegram from Limited's British solicitors to appellant advising that if appellant attempted to do business in the territories of Limited, the latter would "take all possible steps in courts concerned to restrain" (R. 682), and the statement of counsel that appellant had received "much more explosive" letters from Francaise's counsel (R. 684). The letter and cablegram were not introduced in evidence, but were read aloud (over the Government's objection) at the argument on the proposed findings, conclusions and decree (R. 680–684). They were obviously written with a view to influencing the outcome of the instant case in the court below, and cannot be deemed to establish that Limited and Francaise would in fact resort to litigation if appellant invaded their territories.

country, but because the foreign court itself determined that, as a matter of comity, it should follow the American judgment.

The judgment below directs appellant to use "reasonable efforts" to sell its products in foreign markets. We construe that provision as requiring only such acts as do not affirmatively violate a foreign statute, regulation or ordinance, or the valid judgment of a competent foreign court. Thus, if a foreign court were to enjoin appellant from doing business within its territory in violation of the restrictive agreements, compliance with that order would not be required by, or constitute a contempt of, the judgment below. We read the judgment, which uses the words "reasonable efforts," as containing a limitation similar to that drawn by the exculpatory provision in the *General Electric* judgment set forth at pp. 45–46 of appellant's brief.

Finally, we point out that petitioner has made no showing that litigation will actually result if it attempts to do business in its co-conspirators' territory (see note 28, *supra*), or that the foreign courts could obtain jurisdiction over it so as to subject it to any financial liability.[29]

[29] Appellant has not shown that it has any property in the territories of Limited and Francaise which is subject to attachment, and it is unlikely to have any in substantial amount in view of the fact that it has scrupulously stayed out of those areas for 30 years. Although appellant states (Br. 53) that an entry of appearance has been made in England which would subject it to *in personam* jurisdiction by the British courts, the only entry of appearance shown by the record is provided by the 1925 sales agreement between appellant and Limited. That

In sum, the claim of conflict between American and foreign courts is wholly conjectural at this time, and it affords no basis for modification of the judgment. Cf. *International Salt Co.* v. *United States,* 332 U. S. 392, where this Court declined to modify an antitrust judgment on the basis of similarly conjectural claims of future injury. There the district court, upon finding that the salt company had violated the Sherman Act by requiring lessees of salt dispensing machines to purchase the salt used therein from it, not only cancelled the tie-in provisions but also directed the salt company to offer non-discriminatory leases to all persons. The salt company attacked the latter provision as improper, on the ground that since it had never used discriminatory leases, it should be free to reduce rentals in some areas if necessary to enable its machines to compete with those of other manufacturers. This Court, however, declined to eliminate the provision for non-discriminatory leasing. Its reasoning, we submit, is equally applicable to this case:

> The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of "enabling any of the parties * * * to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of

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agreement appoints an agent for service of process with respect to "any matter arising out of this [sales] agreement" (R. 119), and such appointment does not cover matters arising out of other agreements, namely, those for division of markets which are involved in this case.

> this judgment" and "for the amendment, modifications or termination of any of the provisions * * *." We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. Nor are we impressed that this will require a multitude of separate applications. Once the concrete problem is before the District Court it will no doubt be able to fashion a provision that will avoid repetitious applications which would be as vexatious to the Court as to the litigants. We leave the appellant to proper application to the court below and deny the relief here, upon the present state of the record, without prejudice [pp. 401–402].[39]

Appellant places great reliance on the *British Nylon Spinners* case to support its contention that the judgment below impinges on the sovereignty of foreign countries (Br. 48–52). We submit, however, that the case actually supports our contention that the judgment below poses no real threat of a conflict between American and foreign courts.

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[39] In Paragraph XIII the court below retained jurisdiction "for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, for the modification or termination of any of the provisions thereof * * *" (R. 700).

The relevant facts were as follows: In 1946, duPont, an American company, assigned certain patents to Imperial Chemical Industries, Ltd. (ICI), a British company. ICI, in turn, executed in England, in 1947, a contract with British Nylon Spinners, Ltd. ("Nylon Spinners"), also a British company, for a sublicense of the patents. In 1952, however, ICI declined to execute formal licenses because of the pendency of an American antitrust suit. In the latter action, to which ICI and duPont, but not Nylon Spinners, were parties defendant, the district court (Judge Ryan) held that ICI and duPont had violated the Sherman Act through an international cartel for the division and allocation of world markets. *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504 (S. D. N. Y.), opinion on relief, 105 F. Supp. 215. The court's judgment, *inter alia*, cancelled the 1946 patent license agreement between duPont and ICI, and directed the latter to reconvey to the former all the patent rights assigned thereunder.

Nylon Spinners thereupon brought an action in England to enjoin ICI from reconveying the patents to duPont in compliance with the American judgment, and for specific performance of the sublicensing agreement. The British court granted an interlocutory injunction, which was affirmed on appeal (*British Nylon Spinners* v. *Imperial Chemical Industries*, L. R. [1953] 1 Ch. 19), and then, on the merits, ordered specific performance and granted a permanent injunction. L. R. [1955] 1 Ch. 37.

In its opinion on the merits, the British court held ([1955] 1 Ch. at 53) that granting specific perform-

ıce of the sublicensing agreement would not create
ıny difficulty in regard to comity between the courts
the two countries * * *." The court pointed out
p. 45–46) that the American court had applied an
t of Congress "which has no application to the
nited Kingdom," whereas it was "dealing with a
ntract between two British corporations in regard
British property, that is, the patents, and involv-
ıg solely matters which are to be carried out in the
nited Kingdom"; that, as the Court of Appeal had
eld in upholding the interlocutory injunction, "A
erson who has an enforceable right to a license under
n English patent appears therefore to have at least
ome kind of proprietary interest which it is the
luty of our courts to protect" (p. 51); that the Ameri-
an court, in entering its judgment, "was far from cer-
ain that the English courts would accept the validity
f his order, and recognized that these provisions in
is order would be entirely without effect unless they
were accepted and enforced by the English court" (p.
8), and that a British court might prohibit the re-
ssignment of the patents (pp. 53–54); and that if, in
ompliance with an order of the British Court, ICI
executed the license to Nylon Spinners, the American
ourt would not treat such assignment as a contempt
even though its judgment prohibited it (p. 53). The
court concluded (p. 54) that "Judge Ryan has been
careful so to limit his judgment that neither his judg-
ment, nor any judgment of mine which the law of
England requires me to give, will disturb the comity
which the courts of the United States and the courts

of England are so anxious and so careful to observe."

In other words, the British court concluded that since the American judgment did not require ICI to perform any act which a British court subsequently might prohibit, the latter's refusal to accept the American judgment as a defense to Nylon Spinners' suit would not create any real conflict between the courts of the two countries. The end result of the litigation was that each court was found to have properly exercised its jurisdiction: the American court in directing a party before it to take appropriate action abroad, and the British court in declining to give effect to the American judgment in a way that would have upset vested property rights under British law. The significant point about the *Nylon Spinners* case, we believe, is that because the American judgment did not require ICI to perform any acts which a British court subsequently might prohibit, there could be no real conflict between the courts of the two countries.

Since, as we have shown (*supra*, p. 41), the judgment in the instant case similarly does not require appellant to perform any acts abroad which a foreign court subsequently may prohibit, there is likewise no possibility of any real conflict between American and foreign sovereignty in this case. Just as in *Nylon Spinners*, a refusal by a British (or other foreign) court to accept the American judgment as a defense to a suit by Limited (or Francaise) to enjoin appellant from doing business in England (or elsewhere) in violation of the restrictive agreements would not "disturb

the comity which the courts of the United States and the courts of England are so anxious and so careful to observe."

Furthermore, the fact that in the *Nylon Spinners* case the British court refused to follow the American judgment does not mean that it would do so in this case. In *Nylon Spinners,* the American court directed a British company to take action which would have upset vested property rights. In the case at bar, however, the American judgment is directed solely to an American company, and giving it effect abroad would not overturn vested property rights, but would merely prevent further performance of an executory agreement not to compete.[31]

Significantly, appellant's discussion of the *Nylon Spinners* case fails to mention that the American judgment there contained a provision directing competition abroad which was similar to paragraph XI of the judgment in the instant case. Paragraph X (3) of the judgment in *United States* v. *Imperial Chemical Industries* (Civil Action No. 24–13, S. D.

[31] Indeed, the judgment in this case was carefully designed to avoid any interference with foreign property rights. Paragraph XI provides that "Nothing contained in this paragraph shall be construed as requiring the exportation by defendant of any such products in violation of the valid patent or trade-mark or trade-name rights of any person in any foreign country." It further provides that if exportation can validly be made into certain countries only by means of unmarked glass or by adoption of another trade-name, appellant shall, within one year, have available sufficient unmarked glass or glass marked with a new name "to meet reasonable anticipated foreign demand" (R. 716).

N. Y., July 30, 1952, not reported) directed du Pont to

> make such efforts as are reasonable according to duPont's sound business judgment, not arrived at and not influenced by unlawful motives or purposes, under the circumstances at the time prevailing, to promote in the world markets the sale and distribution of chemical products manufactured by it, and * * * each year for five (5) years from the date of this judgment [to] file with the Clerk of this Court a statement [to be kept confidential] detailing the nature and extent of the steps it has taken to promote such sales during the preceding year.[32]

This provision apparently provoked no litigation in the British courts.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DIRECTING APPELLANT TO USE REASONABLE EFFORTS TO PROMOTE THE SALE AND DISTRIBUTION OF ITS PRODUCTS IN FOREIGN MARKETS

The principles which govern the scope of the decree in an antitrust case are well settled. "A trial court upon a finding of conspiracy in restraint of trade * * * has the duty to compel action by the conspirators that will, so far as practicable, cure the

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[32] Similar provisions directing American companies to promote the sale and distribution of their products in world markets have been included in recent consent judgments in other cartel cases. *United States* v. *Norma-Hoffmann Bearings Corp.*, 1953 Trade Cases ¶ 67,523 (Par. VII (A) (2)) (N. D. Ohio); *United States* v. *United States Rubber Co.*, 1954 Trade Cases ¶ 67,771 (Par. VII (A)) (S. D. N. Y.); *United States* v. *R. Hoe & Co.*, 1955 Trade Cases ¶ 68,215 (Par. VII) (S. D. N. Y.). See also *United States* v. *SKF Industries*, 1950–1951 Trade Cases ¶ 62,708 (Par. VI (E)) (E. D. Pa.).

ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. Moreover, "[t]he District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do." *International Salt Co.* v. *United States,* 332 U. S. 392, 400. The "public interest" to be served by the decree in an antitrust case is to "effectively pry open to competition a market that has been closed by defendants' illegal restraints." *Id.,* pp. 401–402. Furthermore, "[t]he determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court." *Gypsum* case, *supra,* p. 89.

We submit that, in the light of the findings and record in this case, the district court did not abuse its broad "discretion * * * to make the remedy as effective as possible" (*United States* v. *National Lead Co.,* 332 U. S. 319, 334) when it directed appellant to "use reasonable efforts * * * to promote the sale and distribution of said [Holophane] products in foreign markets, including the territories of Limited and Francaise." As we have noted (*supra,* pp. 12–15), the record shows that for thirty years appellant and its co-conspirators have maintained an ironclad division of world markets, and have scrupulously refrained from any action which might disturb such allocation. Under these circumstances, we believe that the district court properly concluded that a judgment which merely cancelled the restrictive agreements and en-

joined their enforcement would not be adequate to "effectively pry open to competition a market that has been closed by defendants' illegal restraints" (*International Salt* case, *supra,* p. 401).

The provisions requiring appellant to make reasonable efforts to compete abroad were designed to achieve two related purposes. First, the Government sought to stimulate American export trade in Holophane products—a trade that was non-existent because of appellant's adherence to, and strict policing of, the illegal agreements.[33] Second, the Government hoped that "once this active hostility, perhaps, by the defendant, in selling abroad comes to the attention of Francaise and Limited, they may welcome the opportunity to * * * compete in the American market" (R. 675). Such an entry of American markets by the coconspirators would not only develop American import trade, but would introduce into the American domestic market competition in the sale of Holophane products.

If, as appellant's proposed decree provided (R. 648–654), the district court merely had cancelled the illegal agreements, it is altogther likely that the conspirators would have continued the *status quo,* albeit without formal agreement. "The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish

[33] Thus, Government counsel advised the district court during the hearing on the proposed findings, conclusions and decree that the object of its proposed provisions requiring competitive action abroad was "to prod the defendant into exploring what possibilities there are for foreign trade, for after all, for twenty-seven years the defendant has ignored such possibilities, has refrained from exploring such possibilities" (R. 669; see R. 672).

the fruits of his violation more completely than the court requires him to do." *International Salt* case, *supra*. It was not unreasonable for the district court to conclude that a company such as appellant, which had a history of absolute insistence upon adherence to the market-sharing scheme, even when that involved "the risk of losing some business" (GX 68, R. 360, 361), would not disturb existing business arrangements unless affirmatively required to do so. "[A]dvantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market." *International Salt* case, *supra*, p. 400. "The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to 'be resolved in favor of the Government and against the conspirators.'" *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 726. That test is fully met here. Indeed, requiring appellant to take affirmative action abroad was "the only practical remedy against continuation of illegal trade practices." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186.

We now turn to appellant's specific objections to paragraph XI of the decree.

1. Appellant's argument (Br. 52) that the district court abused its discretion because the decree constitutes an attempt to apply American law to foreign nations, has been fully answered in our prior discussion of the court's power to enter the decree (see *supra*, pp. 35–48). Since there is no possibility of

any real conflict between American and foreign courts, the district court properly concluded that it should not refrain from entering an otherwise appropriate judgment provision merely because of "threats [of litigation] from England or France" (R. 691). The reason given by the court in *United States* v. *Imperial Chemical Industries,* 105 F. Supp. 215, 231 (S. D. N. Y.) for directing reassignment of patents, even though it recognized that a British court might not give effect to such order, is equally applicable to the case at bar:

> If the British courts were not to give credit to this provision, no injury would have been done; if the holding of the British courts were to the contrary, a remedy available would not have been needlessly abandoned.

2. Appellant next contends (Br. 53) that requiring it to promote the sale of its products abroad would subject it to a "penalty." It urges (*ibid.*) that since this Court held in the *Timken* case that divestiture of foreign subsidiaries was not required, this Court should now "strike down 'investiture' of this small company with international business which it does not want and cannot afford."

But, as the record shows, appellant has stayed out of foreign markets because the illegal agreements obligated it to do so, and not because it did "not want" such business (see *supra,* pp. 12–15). Appellant has shown no reluctance to do business in the territories of Limited and Francaise when the latter did not object (see *supra,* pp. 13–15). Furthermore,

appellant's alleged lack of interest in foreign business is hardly consistent with its action in 1944 in purchasing from Limited the exclusive right to do business in South America.

There is nothing in the record to support appellant's assertions (Br. 53) that, in order to sell effectively in the foreign areas, it must send trained sales engineers into those areas or that the sending of such engineers would entail "great expense." The judgment only requires appellant to use "reasonable efforts" to "promote the sale and distribution" of its products abroad. Appellant is always free to seek appropriate modification from the district court of provisions which prove unduly onerous in actual operation (see *supra*, pp. 42–43).

Requiring appellant to use reasonable efforts to promote the sale of its products abroad is no more a penalty than provisions, which this Court has upheld, directing compulsory patent licensing (*United States* v. *National Lead Co.*, 332 U. S. 319, 348), ordering divestiture of portions of a business (*Schine Theatres* v. *United States*, 334 U. S. 110, 128), prohibiting tying (*International Salt* v. *United States*, 332 U. S. 392) or exclusive dealing agreements (*Standard Oil Co.* v. *United States*, 337 U. S. 293), or requiring substantial modifications of business leases (*United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), affirmed, 347 U. S. 521). The fact that in *Timken* this Court held that divestment of foreign subsidiaries was not required is no reason for striking down the less severe remedy of compelling appellant

to develop foreign business in the territories of its unaffiliated co-conspirators.

3. Finally, appellant suggests (Br. 54–57) that since international cartels might be dealt with through international agreements, the district court should not have attempted to regulate them through normal judicial processes. But the possibility of handling the problem through international agreements in no way limits the right—indeed the duty—of the district court to take all necessary steps to eliminate restraints on American foreign trade. The limitation on the function of the district court in Sherman Act cases which appellant proposes is, we respectfully suggest, properly within the province of the Congress and not of this Court.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1956

No. 2.

HOLOPHANE COMPANY, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

REPLY BRIEF FOR THE APPELLANT.

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REPLY BRIEF FOR THE APPELLANT.

PRELIMINARY STATEMENT.*

The manner in which appellee has rephrased the "Questions Presented" on page 2 of its brief shows a basic misconception of the facts and hence the issues presented. In both the first and second questions stated, appellee speaks of dividing world markets and eliminating competition. The only competition eliminated under the challenged agreements is among the Holophane companies

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* Appellant submits the following corrections to its principal brief: In the TABLE OF AUTHORITIES and on page 24 the citation to *Board of Trade of the City of Chicago v. United States*, should read *246* U. S. 231, not *264* U. S. 231; on page 33 the parenthetical remark following the citation to *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211, should read (*25* per cent—alleged in bill of complaint), not (*80 to 90* per cent—alleged in bill of complaint); on page 58 *BOARD* & CASSEL should read *BROAD* & CASSEL.

themselves. There are no "world markets" except in the sense of individual national sovereignties, each of which has its own law and its own right to apply that law within its own territory to the contracts in question.

The effort of appellee to introduce into this case the notion that competition is eliminated with respect to parties other than the Holophane companies themselves is unsupported by any facts. Appellee, itself, failed to include "outsiders" in describing the alleged restraint as being:

> "* * * the division of world markets, and the elimination of competition, among appellant and two co-conspirators * * *." (Brief of appellee, 3-4.)

Finding of fact 19 (R. 707) does not state that the questioned agreements in fact eliminated competition with outsiders. It says only that they:

> "* * * were *designed* to eliminate competition between the parties and with outsiders in all the markets of the world * * *." (Emphasis added.)

Furthermore appellant challenges the finding of a design to eliminate competition "with outsiders." There is no evidence of such an intent. Only competition among the Holophane companies was eliminated or designed to be eliminated so that the three participating companies, all originally with a common ownership, could work together intimately as a type of joint venture under a common name.

ARGUMENT.

I. APPELLANT MADE NO CONCESSION WHICH BARS IT FROM URGING THAT THE CONTRACTS IN QUESTION DO NOT VIOLATE SECTION 1 OF THE SHERMAN ACT.

At pages 18 and 25-27 of the brief of the appellee, it is urged that appellant has conceded the illegality of the agreements in question and therefore cannot challenge the holding that they are in violation of the Sherman Act. The alleged concession occurred in the proposed findings of fact and conclusions of law and the proposed judgment submitted by appellant. The District Court directed both parties to file such papers (R. 107-09).

Although the findings, conclusions and judgment thus proposed by the appellant to Judge Underwood at his direction included a determination of illegality of the contracts in question, such proposals were submitted in an effort to bring the whole matter to a final conclusion on the basis of the decree in *Timken Roller Bearing Co. v. United States*, 341 U. S. 280. The reason for this effort was that Holophane Company, Inc., is a small concern which wished greatly to avoid protracted litigation. To gain this end, it offered to accept a determination of illegality of the contracts if that would relieve it from further expense. This is made clear in the following statement by one of counsel for appellant:

> "Mr. Broad: My version of it is simply this. Feeling as strongly as we do that the agreements were essentially legal to begin with and perhaps are still legal, we can't afford the luxury of carrying on this expensive litigation which will put us out of business anyway. So, we said to the Court and to the Government, 'very well, we will concede the agreements are illegal. We will concede to the cancellation. We will concede never again directly or indirectly to be involved in any such agreement, but please leave us

> alone.' The Government isn't content with that. It wants this little business out of Newark, Ohio to become a world-wide business. We haven't the capital, we haven't the manpower, we haven't the know-how to spread ourselves all over the world, and yet, if we are to comply with the decree that the Government submitted to Your Honor, we have one of these two desperate choices: either to immediately cease doing business, or to go broke within a year or two, and we say that that's an imposition far beyond our means." (R. 665.)

Later in argument Mr. Stevens repeated the same essential thought for appellant:

> "And, so, we say that under the doctrine of ancillary restraints, which is adequately documented in the memoranda submitted to the Court, that we were born legitimate, and whether or not in the passage of time that has become an illegal transaction, this defendant has come into this Court and said frankly and said likewise to Government counsel, 'We are a small company, we have a net worth of less than a million and a half. We can't afford extended litigation. We are willing to have these contracts cancelled if that will terminate this expensive and costly litigation.'" (R. 679.)

The fact that the findings, conclusions and judgment were proposed in an effort to work out a conclusive determination along the lines of the *Timken* decree is shown not only by the proposed conclusion of law quoted at pages 25-26 of appellee's brief, but also from the argument of Mr. Seidler, one of Government counsel:

> "There is a fundamental conflict between the parties in respect to the process of drafting a decree. Now, what the defendant is doing is offering to the Court a package deal. It has picked up a decree in another case, in the Timken case, and offers a part of this decree to this Court as a proper remedy in this

action. On the other hand, the Government offers a decree which is designed to enjoin, first, the continuation of the conspiracy as evidenced in this case by the record, and secondly, to pry open avenues of competition which have been long closed by the respective actions of the parties." (R. 667.)

"* * * Rather than studying the proposals which the Government has made, which are designed to fit this particular case, this case in which the Court has the whole record before it, the defendant would set us to the task of first comparing the proposed decree with that of the Timken decree to see what is left out of the Timken decree in this decree. * * *" (R. 668.)

The foregoing statements were made at a hearing held May 8, 1953. The *Timken* decision had been rendered in 1951. It presented a decree formulated by the District Court for the Northern District of Ohio as reviewed and modified by this Court. It was the "latest word" and binding upon Judge Underwood.

If an effort was to be made to conclude the matter on any basis short of wishful thinking by the appellant, the *Timken* decree was an irreducible minimum for a district court. The proposed findings of fact, conclusions of law and judgment submitted by appellant had to meet the apparent requirements of that case in the court below. No similar restriction is imposed upon appellant in this Court which decided the *Timken* case. No consent decree or judgment is here involved.*

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* The cases cited by appellee are inapposite. *Pacific Railroad v. Ketchum*, 101 U. S. 289, was decided on the ground that the appellant had expressly consented to the decree entered. *United States v. Babbitt*, 104 U. S. 767, in which the Attorney-General consented to a pro forma judgment, was decided on the basis of the rule enunciated in the *Ketchum* case, i.e., waiver by consent. *United States v. Hancock Truck Lines*, 324 U. S. 774, held that it was reversible error for a district court to pass on the validity of an I. C. C. order to which the applicant had expressed unqualified acquiescence.

A conditional concession is not an assertion representing the party's actual belief and hence cannot constitute an admission or waiver. *Cf.* 4 WIGMORE, EVIDENCE § 1061 (3d ed. 1940).

As the language of counsel makes abundantly clear, the sole reason for including findings of illegality in the proposals of appellant before Judge Underwood was to effect a final disposition which would conclude the exposure of appellant to the expense of continued litigation.

II. NO RESPONSIBILITY RESTED UPON APPELLANT TO PROVE FOREIGN LAW.

Relying upon the generality that foreign law is a matter of fact to be proved as such, appellee at pages 21-22 and 37-39 of its brief urges that the failure of appellant to prove foreign law will compel this Court to speculate on the subject. Although it is true that no proof of foreign law was adduced, no defect fatal to appellant is thus presented. The presumptions cited at page 25 of the principal brief of appellant from the *Restatement, Conflict of Laws* § § 622, comment *b*, 623 (1934), show that there is no presumption of identity of English or French law with that of the United States on Sherman Act matters. Appellant submits that the argument of appellee is erroneous for two further reasons, *i.e.*, that the burden of showing consistency with foreign law rests upon the Government when it urges a jurisdiction to order acts abroad and that this Court can take judicial notice of foreign law related to public matters.

A. The Burden of Proving Consistency with Foreign Law Rests Upon the Government.

In the absence of any presumption that foreign law is the same as the law of the United States on Sherman Act matters, he who asserts a right to require affirmative acts abroad should show that no conflict with foreign law is presented. At page 38 of appellant's principal brief *Restatement, Conflict of Laws* § 94 (1934) is quoted. For ready reference, that section is repeated:

> "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed."

Thus the starting point for consideration of the right of a state to direct one subject to its jurisdiction to perform an act in another state is that such act shall not be violative of the law of the state of performance. Such being the substantive rule, the adjective law on burden of proof is parallel. Therefore the burden of showing foreign law falls not upon the appellant, but upon the appellee, because the appellee is the one claiming the right to compel an affirmative act abroad.

No talk of comity between nations can help the Government herein. Comity between nations does not require acceptance by British or French courts of an American order destroying commercial rights of British and French corporations. Comity rests upon a fundamental sameness of attitude and institutions between the sovereignty whose courts issue the order and the sovereignty whose courts accept it. Although "comity" is an illusive term, the following paragraph from a paper by a distinguished Canadian antitrust lawyer supports the above concept:

"I have endeavoured to show thus far that comity has nothing to do with extension of jurisdiction, whether as related to substance or to process. But there is more than this. If, as I believe, comity is extended on a mutual basis and is founded upon identity of position and similarity of institutions, then, before having recourse to it at all, we must enquire if that mutuality, that identity and similarity exists." Hansard *CCH Antitrust Law Symposium* 44, 50 (1953).

B. This Court Can Take Judicial Notice of Foreign Law With Reference to Such Public Matters as the Legality of Contracts Dividing Territories for Commercial Purposes.

The usual rule on proving foreign law in lawsuits between private citizens does not here apply. Proof of foreign law as a question of fact is unnecessary when the public law of a foreign sovereign is involved. Such has been the rule in this Court since the decision of Mr. Chief Justice Marshall in *The Amelia*, 5 U. S. (1 Cranch) 1; *Cf. Walton v. Arabian American Oil Co.*, 233 F. 2d 541 (C. A. 2, 1956); *Siegelman v. Cunard White Star, Ltd.*, 221 F. 2d 189 (C. A. 2, 1955).

In *The Amelia* salvage was allowed to Captain Talbot of the *U. S. S. Constitution* for seizure of a ship from the French. The *Amelia* was owned by a resident of Hamburg. It was carrying a cargo from Calcutta, an English port, to a European destination when it was seized by a French corvette. Thereafter it was recaptured by the *U. S. S. Constitution.*

In order to obtain salvage, Captain Talbot had to establish not only a lawful taking but also the conferring of benefit. In the state of partial war then existing with France, the taking was held lawful. Yet if the French

seizure was illegal and French courts would have released the *Amelia* under international law, no benefit would have been conferred. French law had to be consulted. When presented with no evidence on French law, Mr. Chief Justice Marshall distinguished between the internal law of a nation and its public law. Over objection to lack of proof, he held that a French decree approving the seizure of vessels loaded with goods produced in England or her possessions was public law and as such could be recognized without formal proof. Furthermore, he held that the Court could not presume that the French decree of 1798 would not be enforced by the courts of France even though it contravened international law. (l. c. 37-41.) See also, Dumbauld, *John Marshall and the Law of Nations*, 104 U. Pa. L. Rev. 38, 51-53 (1955).

It is submitted that the law of England and of France upon commercial contracts allocating markets is no less public law than the French decree of 1798 considered in *The Amelia*. The maritime rights involved in Mr. Chief Justice Marshall's day are thoroughly comparable to the commercial rights involved today in international business contracts crossing national boundaries and allocating territories. Such a reference to the law of England or France will show that contracts of the type under consideration are valid by the law of those nations. See discussion at pages 25-26, 42-44 of the principal brief of appellant and pages 18-19 below.

III. THERE IS NOTHING CONJECTURAL ABOUT APPELLANT'S BEING SUBJECT TO SUIT IN ENGLAND OR THE EXPENSE TO WHICH IT WILL BE PUT TO OBEY THE ORDER BELOW IN PERFORMING AFFIRMATIVE ACTS ABROAD.

Repeatedly throughout its brief, appellee brands as conjectural or speculative, difficulties and dangers which appellant finds in the extraterritorial jurisdiction asserted by the court below. The potential conflicts with substantive foreign law will be dealt with later. The reality of appellant's procedural exposure to suit in England and the burden of expense thrust upon it by the decree are discussed herein.

A. Appellant Is Subject to the Jurisdiction of the High Court of Justice in England.

In footnote 29, page 41 of appellee's brief, it is asserted that:

> "* * * the only entry of appearance shown by the record is provided by the 1925 sales agreement between appellant and Limited."

In its principal brief appellant has referred specifically to its designation of an agent for service of process in England at pages 12, 22 and 53. The reference on page 12 of said brief cites Government Exhibit 12 (R. 182). That exhibit is an agreement of February 1, 1944, between appellant and Limited which is described by appellee as an extension of the trading agreement of September 15, 1925, in footnote 17, page 30 of its brief. Paragraph 5 of Government Exhibit 12 reads as follows:

> "This agreement is to be construed and to take effect as a Contract made in England and the American Company hereby submits to the jurisdiction of the High Court of Justice in England and hereby appoints

> Messrs. Wansbroughs, Robinson, Tayler and Taylor, Solicitors of Bristol, England, and every partner for the time being of such firm for accepting service on behalf of the American Company of any Writ, notice, order, judgment or other legal process or document in respect of any matter arising out of this agreement and service of any such document as aforesaid on such appointee shall be deemed to be good service on the American Company for all purposes and the American Company elects domicile at the office of the said firm whose appointment hereunder shall continue until such time as the American Company shall give to the British Company notice in writing appointing some other firm of Solicitors practising in England in place of the said firm." (R. 183-84.)

In addition to the foregoing, a paragraph identical in language is found in Government Exhibit 11, also an agreement dated February 1, 1944, between appellant and Limited in which appellant purchased the South American rights from Limited (Govt. Ex. 11, ¶ 10; R. 180).

Thus whatever appellee has said about the conjectural nature of appellant's exposure to litigation in England because of the order made below must be weighed in the light of appellee's partial and inaccurate reading of the record which clearly reveals appellant to have submitted itself to the jurisdiction of the High Court of Justice. As a matter of interest, the firm appointed as agent of appellant for service in England in Government Exhibits 11 and 12 is the same or the successor to the firm similarly designated nineteen years earlier (Govt. Ex. 3; R. 119).

With an agent for service of process appointed in England, the criticism voiced by appellee against consideration of the cablegram from Limited's British solicitors to appellant read to Judge Underwood seems captious. Although Government counsel may wish to ignore the imminence of litigation against appellant in England,

appellant suggests that the cablegram in question was properly read to the Court and that counsel would have been derelict in the performance of his obligation to the Court if he had not read it. The cablegram in full is as follows:

> "As solicitors for Holophane Limited we refer to civil action No. 2659 in your District Court, United States of America versus Holophane Company, Inc. We understand District Court may make mandatory order directing defendant to do business in contravention agreements with our clients which are governed by English law. If your clients take steps in our clients territory in breach of agreements, our clients acting on advice received will take all possible steps in courts concerned to restrain. We direct attention to case British Nylon Spinners versus Imperial Chemical Industries in which English High Court of Appeal declined to accept that American decree absolved Imperial Chemical Industries from performance of obligations under English contract." (R. 682.)

B. Large Expense Will Inevitably Be Thrust Upon Appellant to Comply with the Order Below.

In footnote 5, page 7 of its brief, appellee acknowledges the appellant's salesmen are engineers and that appellant's engineering organization constitutes its "principal business." This coincides with the statement by appellant that 75 per cent of its sales results from engineering service and that the rendition of scientific lighting service is its real business. The words of the decree below directing appellant "[t]o use reasonable efforts * * * to promote the sale and distribution of said products in foreign markets * * *" must be read in the light of the manner in which appellant has heretofore sold its products.

Inasmuch as the record indisputably shows and appellee has conceded that the "principal business" of appellant is the rendition of scientific lighting service through its sales engineers, compliance with the decree below must be taken to impose upon appellant the responsibility of undertaking to provide sales engineering service for Holophane products throughout the world.

At page 39 of appellee's brief a list of countries is set forth ranging from Norway to New Zealand from which requests for appellant's products have been received. One of the provisions of the decree below specifically requires advertising in trade journals circulated "* * * in all countries in which said products manufactured by 'Limited' or 'Francaise' are sold in substantial quantities." The list of countries from which requests have been received, without further reference to a map, shows the exposure to expense which the advertising provision alone throws upon appellant.

The protestation of counsel for appellee that they:

> "* * * construe the provision in the judgment directing appellant to use 'reasonable efforts' to sell its products in foreign markets as requiring only efforts that would not involve * * * a violation"

of a foreign statute, ordinance, regulation or valid judgment constitutes a virtual admission that the decree as drawn imposes an improper burden upon appellant and at the very least should be modified to make explicit the construction placed upon it by counsel for appellee (Brief of appellee, 21, 41). Even with such an addition, the decree below would still impose an unwarranted burden upon appellant. If sales engineers would not be sent into the territory of Limited or Francaise under such a modification, potential sales volume would be reduced by 75 per cent. Nevertheless, appellant would be required to manufacture

and have on hand unmarked or newly marked glassware for export into the territory of Limited and Francaise covering its whole line. There would be no commercially foreseeable possibility of ever recouping the investment it would have to make in order to produce such glass.

Furthermore, to whatever extent it sold any such glassware, appellant would be conducting a foreign mail order business in the territory of Limited and Francaise contrary to contracts valid under the law of England and France. The courts of this country would thus be in the unseemly posture of consciously fostering violation of such contracts through a device designed to "prod" * Limited and Francaise to acquiesce or retaliate.

On the other hand, if appellant should follow its normal method of selling prismatic glassware as a part of an engineering service, appellant would have an even greater financial burden and exposure to litigation. To start with, it is almost impossible to hire engineers today.** Next, any engineer would have to receive special training as a Holophane man (R. 56, 70, 72). Thereafter he would have to go into his designated territory and begin his sales engineering efforts. All this obviously is expensive. Furthermore, the presence of a sales engineer in the territory of Francaise would put appellant in the same exposed position for in personam jurisdiction it already has in England by virtue of its appointment there of an agent for service of process.

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* For comments showing the antagonism aroused in Canada and England by American judicial "prodding," see, The Globe and Mail (Toronto), August 20, 1952, editorial page, col. 1 and Fletcher-Cooke, *Risk of Applying American Trust Law to Middle East Oil*, The Daily Telegraph & Morning Post (London), Nov. 20, 1952, p. 6, col. 3, reproduced in full in the appendix below.

** As an illustration, see extensive advertisements for engineers in N. Y. Times, October 28, 1956, § 3, pp. 12-21.

IV. NO PER SE ILLEGALITY ATTACHES TO THE CHALLENGED CONTRACTS.

At pages 19-20 and 27-32 of its brief, appellee contends that the contracts here involved are per se illegal despite appellant's small size and market insignificance. This result is attained on several assumptions. The first is that there is no distinction between the division of domestic markets and the division of foreign areas. This position of appellee is at variance with the clear statement by Professor Oppenheim:

> "* * * Untenable as the automatism of the per se violation rules is in domestic antitrust cases, it is apparent that in the face of the frequently greater complications of antitrust cases that involve international trade, rigid rules of law for separating the legal from the illegal are particularly unrealistic and self-defeating. * * *" 50 MICH. L. REV. 1139, 1177 (1952).

The second assumption is that dominance in the market is not a necessary element for a per se violation. This is curious since appellee admits that a dominant position was held by the defendants in each of the cartel cases cited at pages 31-32 of the appellant's principal brief. The fact of such dominance is a contextual element in such cases. With domination of the domestic market, an inquiry into the effect of a restraint imposed upon foreign commerce is not necessary.

The third assumption is in effect that the so-called "quantitative substantiality test" of *Standard Oil Co. of California v. United States*, 337 U. S. 293, is here applicable and because appellant's annual sales of glassware and fixtures aggregate $3,500,000, there is necessarily "an 'appreciable part' of commerce" involved. The authority for importing this doctrine into a Sherman Act case is *United States v. Yellow Cab Co.*, 332 U. S. 218, 225. This

case came before this Court on direct appeal from an order of the district court granting defendant's motion to dismiss the complaint before any evidence was adduced. This Court therefore had to weigh the sufficiency of the charges of the complaint and to give the benefit of all proper inferences from the facts alleged to the Government.

Within a year of the decision, the *Yellow Cab* case was subjected to searching re-examination in *United States v. Columbia Steel Co.*, 334 U. S. 495, 520-24. In rejecting the contention that *Yellow Cab* was authority for the position that all exclusive dealing arrangements are illegal per se, the Court said:

> "* * * A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with nonmembers of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*. * * *" (l. c. 522-23). See also, *Report of the Attorney General's National Committee to Study the Antitrust Laws* 28 (1955), where the *Columbia Steel* decision is discussed in the last full paragraph.

Appellee further relies upon *International Salt Co. v. United States*, 332 U. S. 392, as authority for its contention that if "an appreciable part" of commerce is affected by a restraint, a per se violation must be found. It is interesting that the above quotation from *Columbia Steel* cites *International Salt* as authority for its statement relative

to employing a patented device to compel purchases of unpatented materials. It is further interesting to observe that division of territories is not in the list of per se violations set out in the *Columbia Steel* opinion.

International Salt Co. was the country's largest producer of salt for industrial purposes and the owner of patents on machines for utilizing salt. It leased such machines on condition that International's salt be used in them. The *International Salt* case involved both Section 3 of the Clayton Act and Section 1 of the Sherman Act. The holding under the Sherman Act has been severely criticized. See, *Report of the Attorney General's National Committee to Study the Antitrust Laws* 147, n. 73 (1955).

Thus the effort to import into Sherman Act cases the "quantitative substantiality test" is thwarted by the very construction this Court placed upon both the *Yellow Cab* and the *International Salt* cases in *Columbia Steel.*

In view of appellee's insistence that dominance of the market has no place in determining the legality of the challenged agreements, the address of Honorable Stanley N. Barnes before the Section of Antitrust Law of the American Bar Association, April 6, 1956, is helpful by analogy. In discussing amended Section 7 of the Clayton Act dealing with mergers, he stated the one question he would consider would be whether "quantitative substantiality" should be "*the* test, or *a* test for legality under Section 7." After pointing out the broad theoretical disparity between the so-called *Standard Stations* test of "quantitative substantiality" and the so-called *Pillsbury* test of examining the evidence of effect in the relevant markets, Mr. Barnes said:

> "Evaluating this difference practically most relevant are those facts which, as evidenced by cases filed, the Commission and the Department of Justice deem

warrant violation. All cases thus far have involved acquisitions by 'industry leaders.' Not only have the acquiring firms been major market factors, but acquired concerns also bulk large. Finally, present generally has been some market history of shrinking competition." PROCEEDINGS OF SECTION OF ANTITRUST LAW, AMERICAN BAR ASSOCIATION 16 (April 5-6, 1956.)

V. THE CHALLENGED AGREEMENTS ARE CLEARLY LEGAL UNDER ENGLISH LAW.

At pages 25-26 and 42-44 of the principal brief of appellant the English law on restraints of trade is discussed and the legality of the challenged contracts under that law demonstrated. Except for the specious analysis in footnote 26, page 37 of appellee's brief, no further discussion of English law would be submitted.

In Friedmann *Anti-Trust Laws* (1956) * after citing specific instances in which restraints of trade have been held illegal by English courts, the text reads:

> "Apart, however, from these particular examples of control of a company or a trade or of the membership of a combination in their trade, the courts have, in addressing themselves to the public policy involved in contracts in restraint of trade, conferred in effect the fiat of the common law upon industrial trusts and combines and trade associations and, generally, upon the more important forms of contractual arrangement tending to reduce competition. Agreements to rig tenders, for example, and tying clauses, exclusive dealing agreements, pre-auction bidding agreements, agreements to share out the trade in a particular re-

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* "A Comparative Symposium" edited by Mr. Friedmann, published under the auspices of the Faculty of Law of the University of Toronto and constituting the third volume in its comparative law series.

gion and agreements not to compete *inter partes*, agreements restricting output, pooling agreements and resale price maintenance agreements, have all been adjudged to be in 'reasonable' restraint of trade." (l. c. 349-50.)

Authorities which support the legality and enforceability of "agreements to share out the trade in a particular region" are *Attorney-General of Australia v. The Adelaide Steamship Company, Ltd.*, [1913] A. C. 781, *Collins v. Locke*, 4 App. Cas. 674 (1879) and *Wickens v. Evans*, 3 Y. & J. 318, 148 Eng. Rep. 1201 (1829).

Similarly, George Winthrop Haight in writing upon extraterritoriality has stated:

> "Although the Sherman Act purported originally to codify the common law, our interpretation of restraint of trade has varied widely from that in other English common law countries. Thus, the highest court in the British Commonwealth was 'not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public.' It has long been established in England that if the restraint has been imposed in good faith and for the protection of legitimate trading interests it is lawful even though it may be harmful to third parties." *International Law and Extraterritorial Application of the Anti-Trust Laws*, 63 Yale L. J. 639, 645 (1954).

The quotation cited by Mr. Haight is from the opinion of the Privy Council in *Attorney-General of Australia v. The Adelaide Steamship Company, Ltd., supra*, in which a division of markets was upheld. This decision is further interesting because of its discussion of Sherman Act cases and the rejection of them as of "* * * no real assistance in the present case." (l. c. 801.)

VI. BRITISH NYLON SPINNERS CLARIFIED.

It is strange to hear appellee argue, or at least imply, that the decision of Judge Ryan in *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S. D. N. Y. 1951), 105 F. Supp. 215 (S. D. N. Y. 1952), was looked upon with favor by the English courts. In fact, the language which appellee blandly relies upon to indicate absence of conflict between the American judgment and the English temporary injunction and decree of specific performance appears only after lengthy consideration of the possibilities of conflict and frank recognition of the intrusion of the American judgment upon British sovereignty. The opinions of the Court of Appeal and the Chancery Division are quoted at length on pages 48-51 of appellant's principal brief.

The language upon which appellee relies merely illustrates the reluctance of the English courts to state expressly the clear opposition to the asserted American jurisdiction which their decisions indicate. The politeness evidenced by the judiciary of a friendly nation in expressing its decision not to follow Judge Ryan's judgment should not divert attention from the actual decisions which were rendered in the *I.C.I-B.N.S.* litigation. See, Kahn-Freund, *English Contracts and American Anti-Trust Law; The Nylon Patent Case*, 18 Modern L. Rev. 65, 67 (1955).

It is further submitted that the *I.C.I.-B.N.S.* litigation illustrates that the inclusion of a savings clause in a decree such as the one entered below is neither a practical nor a proper solution to the problem of extraterritoriality in this context. An order decreeing affirmative acts which impinge on the sovereignty of another state is nonetheless offensive, despite such a savings clause. In addition, a decree of a United States court which orders a defendant to take specific action unless he is forbidden to do so by the courts of another state is not in keeping with the dig-

nity of the federal judiciary. It is indeed an anomalous situation for the courts of this country to assert a jurisdiction exercisable only by leave of the courts of another sovereign. Such orders not only evidence the doubts which must necessarily exist as to the propriety of asserting an extraterritorial jurisdiction but also evidence a misconception of international law and the comity of nations under that law.

CONCLUSION.

The maxim "Equity acts in personam and not in rem" has a long history. Adherence to it would have prevented the District Court from asserting a power to cancel the challenged agreements. If no power to cancel had been assumed, power to order affirmative acts abroad would not have been asserted. It is respectfully submitted that the departure from basic equity principles inherent in direct cancellation of the agreements has led the District Court into serious error.

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APPENDIX A.

Article From The Globe and Mail (Toronto) August 20, 1952, editorial page, col. 1.

JUDICIAL ARROGANCE

Details of one of the most astonishing judgments to issue from a United States District Court have just been revealed. The court has ordered the E. I. du Pont de Nemours Company of the United States, and Imperial Chemical Industries of Great Britain to end their respective interests in Canadian Industries Limited of this country, by one of four plans detailed by the court, as follows:

1. Sale of the Canadian Industries Limited shares owned or controlled by du Pont or Imperial Chemical to parties unassociated with the two companies.

2. Sale of the stock of either company to such unassociated parties.

3. Sale of the stock owned by either du Pont or Imperial Chemical Industries to the other.

4. Segregation or physical division of the plants and properties of CIL between Imperial Chemical Industries and du Pont, so as to create in Canada a situation in harmony with United States law.

For sheer effrontery, it might be said that that last clause goes far beyond any previous exhibition of American judicial arrogance. No United States institution, by any decree or order whatsoever, has the right to create any sort of a situation in Canada, least of all one in harmony with United States law. But not only does this incredible judgment purport to order "a situation" in Canada, but it applies its order equally against a British company, over which it has likewise not the slightest vestige of jurisdiction.

At an earlier stage in this suit, which is ostensibly an anti-trust action against the E. I. du Pont de Nemours Company, the judge stated that the court "deemed irrelevant any inquiry into whether the arrangements between the parties actually injured the public interest, or whether the public benefited thereby." This extraordinarily irresponsible attitude is reflected in the terms proposed by the court for effecting its order. As the situation now stands, du Pont and ICI each hold 42 per cent of the stock in CIL. That percentage gives neither party actual control of the Canadian company, so such control theoretically, at least, is held by the 16 per cent of the stock owned by the public. What sense is there, therefore, suggesting that the situation would be improved by the sale of either company's stock to the other, giving one company 84 per cent of the shares? If it is an offense against the United States anti-trust laws for the du Pont company to share partial ownership of a foreign company, why compound the offense by making it possible for it to own 84 per cent control?

Apart from the stock ownership question, however, a cartel does not need such technicalities to be fully effective. Even if this arrogant judgment were to be implemented—and we cannot believe it will be—it would not necessarily change any present policies of the Canadian company. The present arrangement has worked extremely well. That the CIL does not actively compete with du Pont in the United States is not of the slightest consequence to Canadians, and we cannot believe that it makes the slightest difference to Americans either.

If United States courts find that policies followed by companies in their own country are detrimental to the public interest, it is presumably within their power to order appropriate changes. But with regard to the policies

of companies in other countries, they would be well advised to say nothing. In so far as the actions of cartels or combines injure the interests of Canadians, Canadian law and Canadian courts will be quite competent to deal with the problem. We are also prepared to believe that British courts and British law are fully able to deal with any possibly harmful actions of companies established in their jurisdiction.

APPENDIX B.

Article From The Daily Telegraph & Morning Post (London) Nov. 20, 1952, p. 6, col. 3.

RISK OF APPLYING AMERICAN TRUST LAW TO MIDDLE EAST OIL

By CHARLES FLETCHER-COOKE, M.P.,
who has recently visited the United States to make a special study of anti-monopoly legislation there.

The opening sentence of the Sherman Act, 1890, the basic law of American anti-trust legislation, reads, "Every contract combination in the form of trust in restraint of trade or commerce amongst the several States, or with foreign nations, is hereby declared to be illegal."

Hitherto, this "extra-territorial" aspect of the Sherman Act has not attracted much attention. Indeed, in the Webb-Pomerene Act of 1918, Congress felt its way towards excepting the foreign trade of American corporations from the effect of the law. It recognised that the circumstances of foreign trade were different from those of commerce within the United States and that the anti-trust laws might handicap the American trade with foreign traders abroad.

FOR EXPORT

But this tendency was short-lived. During and since World War II the anti-trust laws have become, in American minds and hearts, so fundamental a part of the American way of life that they must be spread over the face of the free world to the end that other, less prosperous, nations should enjoy the benefits of proper competition.

In their zone in Germany, the American authorities took a fierce offensive against the cartels. In the United States itself, the Department of Justice and the Federal

Trade Commission have shown an increasing tendency to attack American corporations for their activities outside the United States, and to include in that attack foreign companies, who may be amenable to the jurisdiction of the United States courts because they maintain offices in New York, as most trading companies must now do.

This missionary zeal was bound to bring the United States Courts into clashes with the laws of other countries. In one case, the Legislature of a Canadian Province passed a special statute, forbidding its nationals to obey the subpoena of a United States Court.

Again, the recent anti-trust suit in the United States against Imperial Chemical Industries and Du Pont de Nemours ended by Mr. Justice Ryan decreeing that the two corporations could no longer jointly own their Canadian subsidiary. This provoked a storm of protest from Canadian newspapers, who complained of "judicial arrogance" and "legal imperialism."

Violations Alleged

Now the whole problem has exploded on the international scene with the current proceedings against five American and two foreign oil companies. Mutual arrangements and agreements, chiefly concerned with and occurring in the Middle East, are alleged to constitute violations of the anti-trust laws.

The case is at present before a grand jury in Washington, and the charges have not yet been formulated. Presumably the basis of the charge will be that, by entering into these agreements, the American companies have prejudiced the position of American producers, that they have excluded other American companies from the Middle East fields and that by various systems of price-fixing they have

artificially kept up the price of oil, to the detriment of American consumers.

It is not necessary for the United States Government, in these cases, to prove that anybody has, in fact, been damaged or, indeed, that the public interest has suffered at all. The mere acts of agreeing to divide up markets, to present a common front to producers, to fix prices, either too high or even too low, are illegal in themselves. In short, it is a crime to possess too much "market power," either alone or in combination.

At one period, such power was not attacked if it was not misused. The so-called "rule of reason" tempered the rigour of the law. But in the last decade, the defence has weakened. Mere opportunity for abuse is now sufficient. American legal and economic doctrine now holds that if laws against restraint of trade are to be effective at all, they must consist of absolute prohibitions irrespective of particular circumstances. Any industry can always show "particular circumstances."

Cost No Barrier

All this works pretty well in the context of the United States economic and political system. The enormous expense of anti-trust suits can be afforded by a country of such prosperity. The hitherto unlimited supplies of raw materials make the waste involved in "disorderly," as opposed to "orderly," marketing tolerable and even desirable.

Above all, the political atmosphere of equality, the rapid rise and fall of personal fortunes, and the suspicion of, if not contempt for, all authority makes these assaults on large centres of economic power an integral part of the pattern of national behaviour.

But life is not like that in the Middle East. There we find the utmost enonomic inequality. There tranquillity is

valued above wealth, speed or progress. There the owners of the mineral oil are not ranchers or speculators, but sheiks and shahs and ancient sovereigns. Above all, there are the frontiers of the Iron Curtain, unavoidably close.

Documents Demanded

Thus the impact of the Sherman Acts upon this area is likely to be revolutionary and perhaps disastrous. A dangerous situation has already arisen over the demand of the Department of Justice for the production of all the documents in the possession of the oil companies for the last twenty years.

One of the seven companies reckons that it would have to examine some 38 million pages located in the United States, and some 155 million pages outside the United States, mostly in languages such as Turkish, Hebrew and Arabic. This would take a thousand qualified searchers an estimated total of more than twenty months, if indeed it is possible at all.

But even if it were possible, what would the sovereigns of the Middle East have to say if all their transactions with these companies, which have taken place on their own soil, were to be exposed in a Washington court? What, indeed, will the Government of Great Britain, or of other European States, feel if American courts assume the power of demanding the production of papers passing between British companies and British Government departments? It is only right to say that the judge trying the present proceedings seems very conscious of the dangers of acceding to any such demand.

But these are small matters compared with the fundamental danger of one country, however powerful, trying

to export a segment of its own legal and economic pattern of life. The segment will not fit into foreign patterns.

Take, for example, the question of price. In the United States prices fluctuate, often violently. Such fluctuations are taken to be the sign of a healthy and resilient economy. But they can be fatal in a less robust setting.

Eastern Suspicions

In the context of immense suspicion of Western methods among the peoples of the Middle East and Asia, such things as uniformity of price and steadiness of supply of oil are soothing factors. If the price and supply of oil were subject to violent fluctuations, the tumult would be irrepressible.

In times of slump prices might fall, but if they fell so would the royalties which the Middle Eastern countries rely on for their revenues. This would arouse intense suspicion and intense discontent. In times of scarcity, however, if prices rose unduly, the amount of wealth flowing into backward countries with no facilities for absorbing wealth quickly would set up most dangerous social strains, and not the least of these might well be a galloping inflation.

The international pricing system adopted by the oil companies has in the main been effective in avoiding such dangers. If this had not been so there might well have been wild booms, followed by collapse. No oil company would, or could, in such circumstances afford the immense capital outlay involved and the immense risks taken in developing these territories.

What then will the American Courts do when confronted with what, at first sight, appears to be a most dangerous conflict between the strict letter of the Ameri-

can law and the overwhelming interest of the free world in general and the United States in particular?

In this particular case, the question may never survive for final judgment. The purely physical difficulties of ever completing the trial of such an action are very great. Furthermore, there would be many obstacles in the way of enforcing any order based upon agreements and arrangements operating outside the jurisdiction of the United States.

Founded On Power

Oliver Wendell Holmes, the great American Judge, used to repeat over and over again in his Opinions: "The foundation of justice is physical power."

This is but a reflection of a well-known principle of private international law, namely, the principle of effectiveness.

However backward and benighted the United States may think the rest of the world is over this matter of monopolies and restraint of trade, the truth is that she cannot, even if she wants to, enforce her sincere and deep convictions upon countries whose outlook is entirely different. The advent of a new Administration gives the Department of Justice a chance to think again.